

1997

# Gentry Gamble v. Daniel R. Larsen and Catherine J. Wheeler : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

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GENTRY GAMBLE,

**BRIEF OF APPELLANT**

Plaintiff/Appellant,

vs.

**Appeal No. 970454-CA**

DANIEL R. LARSEN and  
CATHERINE J. WHEELER,

**Priority No. 4**

Defendant/Appellee.

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**BRIEF OF APPELLANT**

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APPEAL FROM AN ORDER IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE PAT B. BRIAN, PRESIDING

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**UTAH COURT OF APPEALS  
BRIEF**

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DANIEL R. LARSEN and  
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**Appeal No. 970454-CA**

Defendant/Appellee.

---

**STATEMENT OF JURISDICTION**

Jurisdiction to hear this appeal properly lies with the Utah Court of Appeals pursuant to §78-2a-3(2)(h), Utah Code Ann. (1953 as amended).

**STATEMENT OF ISSUES AND STANDARD OF REVIEW**

a. Issue 1: Should the Court approve the concept of "open adoption" including postadoption visitation?

**STANDARD OF REVIEW:** This is an issue of law and this Court should give no deference to the trial court decision and review it pursuant to a correctness standard. Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997).

b. Issue 2: Should the trial court take evidence and consider whether postadoption visitation is permitted in this case?

**STANDARD OF REVIEW:** This is an issue of law and this Court should give no deference to the trial court decision

**STANDARD OF REVIEW:** This is an issue of law and this Court should give no deference to the trial court decision and review it pursuant to a correctness standard. Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997).

c. Issue 3: Did the parties agree upon postadoption visitation and should that agreement be specifically enforced?

**STANDARD OF REVIEW:** This is an issue of law and this Court should give no deference to the trial court decision and review it pursuant to a correctness standard. Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997).

d. Issue 4: Did the Plaintiff state a cause of action as an independent action under Rule 60(b), Utah Rules of Civil Procedure to set aside the Decree of Adoption based upon fraud, misrepresentation and mistake?

**STANDARD OF REVIEW:** This is an issue of law and this Court should give no deference to the trial court decision and review it pursuant to a correctness standard. Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997).

e. Issue 5: Did the District Court lack jurisdiction to consider this matter in light of the Juvenile Court filings prior to the hearing on the Motion to Dismiss?

**STANDARD OF REVIEW:** This is an issue of law and this Court should give no deference to the trial court decision and review it pursuant to a correctness standard. Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES AND RULES**

**A. Statutes:**

- i. §78-2a-3(2)(h), Utah Code Ann. (1953 as amended).
- ii. §78-3(a)-17, Utah Code Ann. (1953 as amended).
- iii. §78-30-1.5, Utah Code Ann. (1990).
- iv. Rule 4-902, Code of Judicial Administration.
- v. Rule 60(b), Utah Rules of Civil Procedure.

**B. Case Law:**

- i. Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997).
- ii. Gillmore v. Wright, 850 P.2d 431 (Utah 1993).
- iii. Gribble v. Gribble, 583 P.2d 64 (Utah 1978).
- iv. In Re Adoption of Children, etc., 406 A.2d 986 (N.J. 1979).
- v. In Re Dana Marie E., 429 NYS.2d 340 (N.Y. 1985)
- vi. In the Interest of S.A.H., 537 N.W.2d 1 (S.D. 1995).
- vii. In the Matter of the Adoption of Jeremiah Halloway Navaho Nation, 732 P.2d 962 (Utah 1986), FN. 11
- viii. Michaud v. Wawruck, 551 A.2d 738 (Conn. 1988).
- ix. Morse v. Daley, 704 P.2d 1087 (Nev. 1985).
- x. Shaw v. Pilcher, 341 P.2d 949, 950 (Utah 1959).
- xi. Spells v. Spells, 378 A.2d 879 (Pa. 1977).
- xii. St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 196 (Utah 1991).
- xiii. St. Pierre v. Edmonds, 645 P.2d 615 (Utah 1982).
- xiv. State of Utah In the Interest of J.W.F. Petition

of Schoolcraft, 799 P.2d 710 (Utah 1990).

xv. Sturrrup v. Manhan, 305 N.E.2d 877 (Ind. 1974).

xvi. Workman v. Workman, 498 P.2d 1384 (Okla. 1972).

#### **STATEMENT OF THE CASE**

##### **A. NATURE OF THE CASE:**

The Plaintiff is the natural father of Trevor B. Wheeler-Gamble and Baron G. Wheeler-Gamble. Mr. Gamble consented to the step-parent adoption of his two sons subject to conditions, including postadoption visitation. The parties complied with postadoption visitation for twenty-two (22) months until the children reported abuse by the Defendants. Apparently, the Defendants blame the Plaintiff for that report and have refused any visitation or contact between Mr. Gamble and the children.

The Plaintiff's action seeks: (1) postadoption visitation; (2) the specific performance of the parties' agreement for postadoption visitation; and, (3) in the alternative, an order setting aside the Decree pursuant to the Plaintiff's independent action under Rule 60(b) Utah Rules of Civil Procedure based upon fraud, misrepresentation, and mistake.

Prior to the hearing on the Defendant's Motion to Dismiss the Plaintiff commenced Petitions to Terminate Parental Rights in the Juvenile Court. The trial court denied the Plaintiff's Motion to Certify the Case to Juvenile Court and granted the Defendant's Motion to Dismiss pursuant to Rule 60(b)(6) essentially finding that the Plaintiff lacked standing to pursue

any relief after his Consent to Adoption was given and the adoption granted.

B. COURSE OF PROCEEDINGS:

The trial court granted the Defendant's Motion to Dismiss every cause of action of the Plaintiff (including the Plaintiff's cause of action for specific performance which was sought by way of amendment to the Complaint. The Petitioner has pending in the Juvenile Court two Petitions to Terminate Parental Rights as to the subject children.

C. DISPOSITION AT TRIAL COURT:

The trial court entered its Findings of Fact, Conclusions of Law and Order on June 27, 1997.

**STATEMENT OF FACTS**

1. Gentry Gamble is the natural father of Trevor B. Wheeler-Gamble (hereinafter "Trevor"), born February 10, 1987; and Baron G. Wheeler- Gamble (hereinafter "Baron"), born July 24, 1985. Amended Complaint (A.C.), p. 1, ¶3.

2. The Plaintiff and Defendant Catherine Wheeler were husband and wife, which marriage was dissolved by Decree of Divorce in the Third Judicial District Court, in and for Salt Lake County, State of Utah, dated on or about April 14, 1989, Catherine Wheeler v. Gentry Gamble, Civil No. 884903729DA. A.C., p. 1, ¶4.

3. In that Divorce Decree, Catherine Wheeler was awarded the permanent care, custody and control of the children, Baron and Trevor, subject to the reasonable rights of visitation as



particularly described therein in favor of Gentry Gamble. A.C., p. 2, ¶5.

4. The Defendants married on March 1, 1991. A.C., p. 2, ¶7.

5. Due to circumstances beyond the control of the Plaintiff he became in arrears on child support payments. The arrears resulted from the failure of the Plaintiff's business and a coincident illness which rendered him insolvent in 1993. A.C., p. 2, ¶8.

6. Following the Defendants' marriage, the Defendant Daniel R. Larsen petitioned the Court to adopt Baron and Trevor by way of a Petition, dated February 24, 1995. A.C., p. 2, ¶10.

7. The Defendants approached Gentry Gamble to obtain his consent as the natural father of Baron and Trevor for their adoption by Defendant Daniel Larsen, and in the course of negotiations regarding that request, Gentry Gamble, based upon the written representations, promises and in consideration of the parties' agreement, granted his consent to the adoption and executed a Consent which was filed with the Court. Based upon the Consent, the Petition of Daniel R. Larsen to adopt Trevor and Baron was granted on or about April 27, 1995. A.C., p. 2, ¶11.

8. Prior to Gentry Gamble's Consent for the adoption, the Defendants agreed, in writing, individually and through their agent, for Gentry Gamble to maintain the present visitation schedule with Trevor and Baron, subsequent to the adoption. See

letter of Kevin J. Fife, Esquire, dated March 8, 1995, marked Exhibit "A", Addendum. A.C., p. 3, ¶12.

9. The agreement of the parties', furthermore, stated that the two minor children would be known as the surname "Wheeler-Gamble". A.C., p. 1, ¶4.

10. The postadoption visitation schedule was defined by the Decree of Divorce and included alternating weekend visitation, extended visitation as well as visitation on holidays, during the mid-week, and at other agreed upon times. A.C., p. 3, ¶13.

11. As part of the parties' bargain and agreement, the Defendants agreed to satisfy any judgment or claim they had for child support arrearages. A.C., p. 3, ¶14.

12. Prior to the parties' agreement and prior to the Decree of Adoption based upon Plaintiff's consent, the Defendants had threatened Gentry Gamble with civil prosecution for failure to pay his child support, and criminal prosecution as well. A.C., p. 3 ¶15.

13. Since the granting of the Decree of Divorce, the parties had abided by their agreement, that is:

i. the Defendants had provided for and allowed Gentry Gamble to continue to exercise the visitation schedule that the Defendants had adopted;

ii. the Defendants did execute a Satisfaction of Judgment as to child support arrearages and claims; and,

iii. the minor children, since the adoption, have been known by the name "Wheeler-Gamble". A.C., p. 4, ¶16.

14. Prior to and since the Decree of Adoption, the relationship between the Plaintiff and his sons, has continued, and has, in fact, become more mature and meaningful. In spite of the Decree of Adoption, Baron and Trevor continue to look to the Plaintiff as their father and the emotional parent/child bond between them has continued and has not been altered. A.C., p. 4, ¶17.

15. Consistent with the Defendants' agreement, and their practice of visitation since the Decree of Adoption, the Plaintiff and his sons have continued to enjoy visitation, holidays, Father's Day, as well as numerous family celebrations and experiences, all of which are consistent with the Defendants' agreement and the parent/child bond and relationship which persists between the Plaintiff and the children. A.C., p. 4, ¶18.

16. The Plaintiff alleges that the Defendants failed to inform the adoption court of their agreement with the Plaintiff for ongoing visitation rights with the children at the time of the granting of the Petition for Adoption. A.C., p. 4, ¶19.

17. On or about the 19th day of January, 1997, the Defendants arbitrarily, without just cause, and contrary to the acknowledged best interest of Trevor and Baron, unilaterally terminated the Plaintiff's visitation with those children. A.C., p. 4, ¶20.

18. The children have been forbidden to see or communicate with the Plaintiff. A.C., p. 5, ¶21.

19. The children have been instructed by the Defendants to ignore the Plaintiff and have been threatened with discipline in the event that they disobey the Defendants in this regard. A.C., p. 5, ¶23.

20. In spite of the informal efforts of the Plaintiff to continue to visit with the children as the parties agreed and have allowed for nearly two years since the adoption, the Defendants have refused. A.C., p. 5, ¶24.

21. As a result of the Defendants' actions, the children have been denied the ongoing comfort, counsel and benefits of their relationship with their father. A.C., p. 5, ¶25.

22. At the time the Plaintiff executed his Consent the Defendants represented to him that he would continue to maintain the present visitation schedule with his sons. The Plaintiff relied upon that representation at the time he executed the Consent to adoption. The Defendants' representation was critical to the Plaintiff. The Defendants knew full well, at that time, that they had no intention of granting the Plaintiff visitation rights and would, at the slightest provocation, unilaterally assert their technical rights under the Decree of Adoption to deny the Plaintiff any further visitation or any contact whatsoever with the children. Had the Plaintiff known the truth of the Defendants' representation (that they maintained the right to unilaterally terminate the visitation privileges of the Plaintiff), he would never had executed the Consent, nor

permitted the adoption to proceed without his objection. A.C., p. 6, ¶29.

23. The Defendants induced the Plaintiff to give his consent to the adoption of his sons based upon the foregoing promises which are contrary to the representations made to the adoption court, which were relied upon by the court, for the granting of the Decree of Adoption. A.C., p. 7, ¶31.

24. The Plaintiff stipulated to dismiss his cause of action for termination of parental rights set forth in the District Court Complaint. Prior to dismissal of the District Court action by the Judge, the Plaintiff had commenced a Petition for Termination of Parental Rights in the Third District Juvenile Court in and for Salt Lake County, In Re Interest of Trevor B. Wheeler-Gamble and Baron G. Wheeler-Gamble, Case Nos. 933163 and 933164.

#### **SUMMARY OF ARGUMENT**

**I. THIS COURT SHOULD PERMIT THE PRACTICE OF "OPEN ADOPTION", INCLUDING POSTADOPTION VISITATION BY A NATURAL PARENT IN A STEP-PARENT ADOPTION.**

The trend is to approve the concept of open adoption. Open adoption has been approved in other states even where there is no specific statutory allowance for the concept. Open adoption has been tacitly approved by the Utah Supreme Court. Open adoption is practised throughout the state as a practical matter.

Open adoption is based upon the best interests of the children, not "parental rights". Open adoption may be based upon the agreement of the parties, or an independent finding of the

best interests of the children. In any case, it is dependent upon the best interests of the children.

**II. POSTADOPTION VISITATION SHOULD BE PERMITTED IN THIS CASE.**

The trial court determined that the Plaintiff had no standing to pursue postadoption visitation. The court concluded that the Consent and the Adoption Decree terminated all parental rights. However, the parties had agreed on postadoption visitation. The expectation of postadoption visitation was a condition of the Plaintiff's consent. The visitation actually took place for twenty-two (22) months until it was arbitrarily terminated by the Defendants. The children have and continue to enjoy a parental bond with the Plaintiff. The visitation has been in their best interests and the abrupt termination of visitation is contrary to the children's best interests.

If the court approves of the concept of "open adoption", the Plaintiff should enjoy postadoption visitation in this case. Consistent with the best interests of the children, the case should be remanded for those factual determinations.

**III. THE ENTIRE CASE SHOULD HAVE BEEN CERTIFIED TO THE JUVENILE COURT AFTER THE PLAINTIFF COMMENCED HIS PETITION TO TERMINATE PARENTAL RIGHTS.**

Once the Plaintiff had commenced Petitions to Terminate Parental Rights in the Juvenile Court, this matter should have been referred to the Juvenile Court for determination.

**IV. THE PLAINTIFF STATED AN INDEPENDENT CAUSE OF ACTION FOR RELIEF BASED UPON FRAUD.**

Inasmuch as the Defendants did not divulge to the court the existence of their agreement for postadoption visitation, and the other conditions or inducements associated with the Plaintiff's consent, there is "fraud upon the court". Additionally, the Plaintiff relied upon the representations of the Defendants to the effect that he would enjoy a right to postadoption visitation. All along the Defendants intended that they would have the discretion to interrupt postadoption visitation and contact in their discretion. Had the Plaintiff known of that intention, he would have never given his consent. The independent action under Rule 60(b) should go forward.

**DETAIL OF ARGUMENT**

**POINT I.**

**THIS COURT SHOULD PERMIT THE PRACTICE OF "OPEN ADOPTION", INCLUDING POSTADOPTION VISITATION BY A NATURAL PARENT IN A STEP-PARENT ADOPTION.**

The trial court granted the Defendants' Rule 12(b)(6) Motion to Dismiss. The Plaintiff's Amended Verified Complaint seeks an order continuing the parties' practice of postadoption visitation, among other things.<sup>1</sup>

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<sup>1</sup> At the hearing on Defendants' Motion to Dismiss, the court considered the Plaintiff's Motion to Amend his Complaint to state a cause of action for specific performance and breach of contract. However, the court concluded that the new cause of action should also be dismissed. The Amended Complaint also eliminated the Plaintiff's Petition to Terminate Parental Rights. The Plaintiff filed a Petition as to both children, separately, in the Third District Juvenile Court prior to a hearing on Defendants' Motion to Dismiss.

In so doing, the court relied upon the Decree of Adoption signed by the District Judge and stated, "In light of Judge Frederick's termination of parental rights with these children, Plaintiff lacks standing to seek or enforce visitation rights after the Decree of Adoption became final on April 27, 1995." (Findings of Fact, Conclusions of Law and Order, ¶7, Conclusions of Law.)

"When reviewing a trial court's grant of a Rule 12(b)(6) Motion to Dismiss 'we accept the factual allegations in the Complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the Plaintiff.

Because the propriety of a Rule 12(b)(6) dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard.'" Alvarez v. Galetaka, 933 P.2d 987 (Utah 1997), quoting St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 196 (Utah 1991).

The effect and reasoning of the trial court's decision would bar the possibility of an open adoption.

". . . A fundamental concept of an open adoption is to allow some communication between adoptive and natural parents, and when appropriate, to permit communication between the natural parent and the child as the child grows up. . ." In the Matter of the Adoption of Jeremiah Halloway, Navaho Nation, 732 P.2d 962 (Utah 1986), F.N. 11.

This concept includes the potential for postadoption visitation by the parent who consents to the adoption. In the Interest of S.A.H., 537 N.W.2d 1 (S.D. 1995).



The Court's conclusion in this case was that under no circumstances could the Court permit an open adoption and postadoption visitation when a standard consent has been signed by the natural parent and an adoption decree entered. This is in spite of the following facts and inferences which are supported by the record:

i. The Plaintiff's Consent for Adoption was conditioned upon the promise of continuing visitation with his two sons;

ii. The children's best interests would be served by continued visitation;

iii. Subsequent to the adoption, visitation continued as agreed for some twenty-two (22) months;

iv. The minor children have maintained their parent/child relationship and bond with the Plaintiff since the adoption.

v. The children have continued to interact with the Plaintiff as their father by engaging in traditional Father's Day visits and activities, for instance.

vi. The Defendants breached their agreement with the Plaintiff when they unilaterally, and without cause, terminated any contact whatsoever between the Plaintiff and the children (coincident with the children's reporting of abuse to their school principal).

vii. The Plaintiff relied upon the representations of the Defendants regarding postadoption contact and

visitation, and had he known the truth of the Defendant's intentions (to terminate visitation and contact at their will), the Plaintiff would never have consented to the adoption.

viii. The Judge who granted the adoption was unaware of the parties' agreement and the inducements associated with the Plaintiff's consent.

In appropriate cases, the trend is to approve open adoptions.

"Three trends appear in the adoption area - moves toward earlier termination of parental rights so that children can be adopted, a willingness to allow non-married partners to adopt their partner's child, **and an increased willingness by court's to consider open adoptions.**" L.D. Elrod and R.G. Spector, A Review of the Year in Family Law: of Welfare Reform, Child Support and Relocation, at p. 775, Family Law Quarterly, Winter, 1997.

In fact, the Utah Supreme Court has shown an inclination to look favorably upon the concept of open adoption. In the case of In the Matter of the Adoption of Jeremiah Halloway, Navaho Nation, 732 P.2d 962 (Utah 1986), the court considered whether Utah Courts had jurisdiction over a full blooded Navaho enrolled in the Navaho tribe. The court concluded that the Utah State courts did not have jurisdiction. This called for the return of the child to his mother. The court was obviously concerned about the relationship of the child and the prospective adoptive parents. The child had lived with the prospective adoptive parents for several years prior to the intervention of the Navaho Nation in the adoption proceedings.

In that case, the court cited, with approval, the concept of "open adoption". The court could not enforce open adoption because Utah courts lacked jurisdiction in that matter. Justice Zimmerman stated:

"11. An innovative approach to adoption, called an open adoption, is gaining increased recognition among professionals in the adoption field and may be suited to this case. A fundamental concept of an open adoption is to allow some communication between adoptive and natural parents and, when appropriate, to permit communication between the natural parent and the child as the child grows up. See generally S. Arms To Love and Let Go (1973). This approach presents some creative possibilities in the instant case: an arrangement might be reached which would allow Jeremiah to remain with his adoptive parents but also would permit the tribe to teach the child about his Indian heritage. We make this statement as an observation only. Recognizing that the matter is not ours to decide."

The best interests of the child is always the overriding concern in an adoption case. This principle has been adopted by statute in Utah:

**"Legislative Intent.** It is the intent and desire of the legislature that in every adoption the best interest of the child should govern and be of foremost concern in the court's determination." § 78-30-1.5, Utah Code Ann. (1990).

Consistent with that goal, courts have found that open adoption is appropriate in some cases, though not in all cases.

"The practice of permitting postadoption visitation by the natural parents of adopted children may benefit certain children by protecting them from the psychological harm that may result from the complete severance of the former family ties, and by allowing adoptions to take place when natural parents

are unwilling to lose all contact with their children, but would otherwise favor the adoption." Annotation: Postadoption Visitation by Natural Parent "Open adoptions", 78 A.L.R. 4th 218 at 223.

See also, Anadio and Deutsch, Open adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives, 22 J. Family Law 59 (1984) and Nathan, "Visitation After Adoption: In the Best Interests of the Children", 59 NYU L. R. 633 (June 1984).

Additionally, courts which have allowed open adoption without the benefit of statutes which specifically allow postadoption contact:

"Without expressly addressing the issue of postadoption visitation, adoption statutes generally establish a vehicle for terminating the legal relationship between the natural parents and their children, and for giving the adoptive parents full custody rights of the same nature and scope of those of a natural parent. . . Thus, courts deciding whether to permit postadoption visitation by a natural parent must frequently reach a decision without the benefit of explicit statutory guidance." Annotation: Open Adoptions, supra at 224.

Therefore, Courts have approved the concept of open adoption and postadoption visitation for a natural parent when it will promote the best interests of the adopted child. Morse v. Daley, 704 P.2d 1087 (Nev. 1985), and Re Adoption of Children, etc., 406 A.2d 986 (N.J. 1979) (here the New Jersey court allowed visitation by the natural father where the natural father had enjoyed a viable relationship with the adopted children) and In Re Dana Marie E., 429 NYS.2d 340 (N.Y. 1985) (where the court

followed the view that a child's best interest may require an order granting postadoption visitation to a natural parent and her twelve year old daughter. In part, the court relied upon legal commentary concluding that continued postadoption contact with the natural parent would, in certain circumstances, help a child to become better adjusted emotionally.)

Other jurisdictions have approved postadoption visitation where the consent for adoption was conditioned upon such right. In In Re Adoption of Children, etc., *supra*, the court held that it was proper to allow postadoption visitation by a natural father where his consent to the adoption was on the condition that the court would preserve the independent enforceable right of the daughters' at their sole and exclusive option, to visit him, and concluded that such an arrangement was in their best interest. In so doing, the New Jersey court recognized the fact that many adult adoptees have a psychological need to know the facts concerning their parentage and concluded that a certain similar psychological need must be recognized where a child already knows and have a viable relationship with a natural parent who consents to a step-parent's adoption.

Generally, in determining whether or not an open adoption should be allowed together with postadoption visitation, courts have looked to the following considerations:

- i. the nature of the relationship between the natural parent and the adopted children;

ii whether there was an agreement for postadoption visitation;

iii. whether the adopted child would be harmed by a total severance of the relationship with the natural parent;

iv. whether the consent for adoption was conditional;

v. whether the adoption is a step-parent adoption;

vi. any facts which would weigh against postadoption visitation and contact; and,

vii. generally, whether the postadoption visitation and contact would be in the best interests of the child or children.

All of the above considerations are fact sensitive. They call upon the finder of fact to exercise discretion and wisdom. Where the facts would suggest that an open adoption is favorable, a motion to dismiss should be denied.

#### POINT II.

#### POSTADOPTION VISITATION SHOULD BE PERMITTED IN THIS CASE.

In granting the Defendant's Motion to Dismiss the trial court found that the Plaintiff had no standing. Presumably this is due to the legal effect of the Plaintiff's consent for adoption and the Decree of Adoption. However, Utah has permitted visitation between children and third parties where those third parties have no "legal" right to such a privilege. Visitation rights have been permitted when the best interests of the children had been served. In Gribble v. Gribble, 583 P.2d 64 (Utah 1978), the Utah court permitted step-father visitation in

the absence of an adoption by the step-father, where the visitation would serve the best interests of the child. See also, Workman v. Workman, 498 P.2d 1384 (Okla. 1972); Sturup v. Manhan, 305 N.E.2d 877 (Ind. 1974), and Spells v. Spells, 378 A.2d 879 (Pa. 1977).

In State of Utah In the Interest of J.W.F. Petition of Schoolcraft, 799 P.2d 710 (Utah 1990), the Utah court held that a step-parent (whether or not they stood "in local parentis"), was to be treated as a relative and entitled to a hearing as to whether it is in the child's best interest to be awarded custody or visitation rights. The court reasoned:

"We conclude that several factors may justify granting a person standing to petition for custody of a child. As the court of appeals noted, the legally enforceable financial obligations that a person had toward a child may suffice to give that person standing to seek custody. However, the grant of standing cannot be determined solely by reference to legal support obligations. Equally important is the person's status or relationship to the child even if the person has no legal duty of support to a child, that person's legal relationship to the child may suffice for standing. Examples include close relatives, who, although lacking a duty of support, may be perceived by reason of that relationship to have the child's best interests at heart. Such a relationship would seem to warrant a grant of standing. (Footnote 4)

(Footnote 4) In addition, it is conceivable that persons who are not related by blood or marriage, although not presumptively entitled to standing, could show that had a relationship with the child that would warrant a grant of standing. We have no such situation before us today." In Re J.W.F., supra.

More recently, a natural mother's girlfriend has been awarded visitation rights, and the natural mother's Motion to Dismiss that action for lack of standing was denied in the case of A.I. v. C.D., Case No. 940902124, decided by Judge Leslie A. Lewis, Third District Court, State of Utah. While the case is not binding authority on this court, it is consistent with a practice which is not at all unusual in Utah courts, and particularly Juvenile courts, to acknowledge and permit visitation by third parties, including grandparents, where adoption takes place following the termination of parental rights or the death of natural parents. See: In the Matter of AA Berlin, Case No. 943900233 in the Second Judicial District Court in and for the County of Weber, State of Utah (where grandmother was permitted ongoing contact and standard visitation rights as part of the adoption decree where a child's aunt adopted following the death of the natural mother).

In this case, the considerations set forth above suggest that ongoing visitation by the Plaintiff should be permitted. Mr. Gamble did not consent to the adoption of his sons because of a deteriorated or destroyed parent/child relationship. Rather, the relationship is sound and has continued as an appropriate parent/child relationship even after the adoption. By all indications, the continued relationship between the children and Mr. Gamble would be beneficial to them. In fact, there is no suggestion on the record to the contrary.



Mr. Gamble's consent was conditional and based upon the written promise of ongoing visitation. Had it not been for that promise, Mr. Gamble would not have consented to the adoption. In similar cases, other courts have specifically enforced such an agreement. See Michaud v. Wawruck, 551 A.2d 738 (Conn. 1988). In the Michaud case, the court enforced an open adoption and visitation agreement between the natural mother and the adoptive parents so long as the child's best interests were the determinative criteria. In that case the natural mother had consented to the adoption and was allowed to specifically perform the agreement requiring postadoption visitation. The court specifically rejected the contention that the enforcement of the agreement would somehow violate the state's adoption statutes.

Consistent with the parties' agreement, Mr. Gamble was permitted visitation for twenty-two (22) months following the adoption. In contract terms, such behavior would constitute part performance of the parties' contract. It certainly created a reasonable expectation on the part of the children for ongoing contact with the person they still view as their natural father.

### POINT III.

**THE ENTIRE CASE SHOULD HAVE BEEN CERTIFIED TO THE JUVENILE COURT AFTER THE PLAINTIFF COMMENCED HIS PETITION TO TERMINATE PARENTAL RIGHTS.**

The Complaint originally stated a cause of action for termination of parental rights based upon the abuse and neglect of the subject children. This cause of action was in addition to the Plaintiff's claim for postadoption visitation, to set aside

the Decree, and for the specific performance of the parties' visitation contract. The Defendants moved to dismiss the termination cause of action. The Plaintiff agreed to dismiss that cause of action and moved to amend the Complaint to state the cause of action for specific performance.

The Plaintiff then filed two Petitions to Terminate Parental Rights as to each of the subject children. See Addendum F, the "Amended Petition for Termination of Parental Rights", Gentry Gamble, Petitioner, Case Nos. 933163 and 933164.<sup>2</sup>

Rule 4-902, Code of Judicial Administration, states as follows:

"(1) In district court cases where there is a question concerning the support, custody or visitation of a child and a petition concerning abuse, dependency or neglect of the same child has been filed in juvenile court, the district court shall certify the question of support, custody or visitation to the juvenile court for determination.

(4) When the district court certifies questions of support, custody or visitation, the clerk of the district court shall transmit the entire case file to the clerk of the juvenile court who shall refer to the presiding judge for assignment."

Furthermore, §78-3(a)-17, Utah Code Ann. (1953 as amended), also requires the certification of such cases to Juvenile Court in addition to granting the District Court discretion to certify such cases "at any time" whether an action is pending in the Juvenile Court or not.

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<sup>2</sup> The Petition was originally filed on May 8, 1997 and later amended.

POINT IV.

**THE PLAINTIFF STATED AN INDEPENDENT CAUSE OF ACTION FOR RELIEF BASED UPON FRAUD.**

The Plaintiff brought his action pursuant to Rule 60(b), Utah Rules of Civil Procedure as an independent action seeking to set aside the Decree of Divorce. The Defendants moved to dismiss this action claiming that it was not timely, or that it was not within the three month provision of Rule 60(b). However, there is no three month time limit on an independent action pursuant to Rule 60(b). See St. Pierre v. Edmonds, 645 P.2d 615 (Utah 1982). Rule 60(b), in relevant parts, states as follows:

"This Rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules, or by an independent action."

An independent action is the proper way to attack an adoption decree which is allegedly procured based upon fraud. Shaw v. Pilcher, 341 P.2d 949, 950 (Utah 1959). Additionally, fraud, accident and mistake are grounds for relief by way of independent action. The Utah Supreme Court, in Gillmore v. Wright, 850 P.2d 431 (Utah 1993), elaborated on the holding in St. Pierre v. Edmonds, supra, and stated:

"This case [St. Pierre] did not state that an independent action will only lie for such claims or that such an action is no longer viable to remedy errors based on mutual mistakes of fact in legal descriptions. Moreover, we cited 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, §2868, at 239-40 (1973) which

specifically states that an independent action in equity, also will lie on the basis of accident or of mistake."

The St. Pierre case is particularly instructive. That case involved allegations of "fraud upon the court" which were based upon claims that the plaintiff had assented to a settlement agreement as a result of harassment, threats, abuse, and intimidation by her ex-husband.

In this case, the Plaintiff asserts that the consent for adoption was based upon: (1) the contract and promise for continued visitation rights; (2) because the Defendants had threatened legal proceedings and criminal proceedings because of the Plaintiff's failure to pay child support due to circumstances beyond his control; and, (3) the inducement to forgive child support arrearages. In essence, the Defendants took advantage of the Plaintiff's dire financial straits and emotional ill health.

The letter from Mr. Larsen's attorney referencing the agreement for ongoing visitation was never divulged to the Court. Had the agreement been divulged to Judge Frederick, the adoption would never have been granted. Whether that information was divulged to Judge Frederick was beyond the Plaintiff's control. Only the Defendants decided what evidence they would give the Judge in order to obtain the adoption. The fact that the natural father, who purportedly consented to the adoption, would continue to enjoy parental rights was a pivotal fact. Additionally the fact that the Plaintiff had been induced to give his consent by

virtue of the promise for ongoing visitation, and the satisfaction of child support arrearages, would have been relevant factors for the Court to consider in the adoption proceeding. The Plaintiff's Complaint states a cause of action under St. Pierre. The Defendants clearly withheld information and thereby perpetrated a fraud upon the Court.

#### **CONCLUSION**

Open adoption should be approved by this Court. As part of an open adoption, under proper circumstances and when it is in the best interests of the child, postadoption visitation should be permitted. Unless there is a statute expressly barring such an award, it has been held permissible in other jurisdictions. Consenting to an adoption should not, necessarily, result in a termination of any contact between the natural parent and the adopted child. The adoption may effectively terminate parental rights, but postadoption visitation derives from the child's best interests rather than parental rights.

In this case, the parties agreed to postadoption visitation which continued for twenty-two (22) months after the adoption. Visitation and contact were terminated unilaterally by the Defendants without consideration of the children's best interests. The children's best interests should be a factual question resolved by the trial court.

The Plaintiff has stated an independent cause of action to set aside the adoption decree based upon fraud. Contrary to the representations contained in the consent and decree, the parties

had, in fact, agreed upon postadoption visitation. Additionally, the consent was procured based upon misrepresentation of the Plaintiff's postadoption visitation and induced by promises which were not divulged to the court.

In response to the Defendant's Motion to Dismiss, the Plaintiff commenced a Petition to Terminate Parental Rights in the Juvenile Court. This case should have been certified to the Juvenile Court for determination.

The matter should be remanded to the Juvenile Court to take evidence and make findings of fact in regards to the best interests of the children and whether or not postadoption visitation should continue. Additionally, the Plaintiff should be entitled to pursue his claim to set aside the Decree under his Rule 60(b) independent action.

DATED THIS 29 day of October, 1997.


GREEN & BERRY

A handwritten signature in cursive script, appearing to read "Frederick N. Green", is written over a horizontal line.

FREDERICK N. GREEN  
Attorney for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

I, Frederick N. Green, certify that on the 29 day of October, 1997, I served a copy of the attached Brief of Appellant upon William W. Downes, Jr., Esq., Winder & Haslam, the counsel for Defendant/Appellee in this matter by mailing a copy by first class mail with sufficient postage prepaid to the following address: 175 West 200 South, Suite 4000, Salt Lake City, Utah 84110-2668,

  
FREDERICK N. GREEN  
Attorney for Plaintiff/Appellant

Tab A



William W. Downes, Jr. (#0907)  
WINDER & HASLAM, P.C.  
175 West 200 South, Suite 4000  
Post Office Box 2668  
Salt Lake City, Utah 84110-2668  
Telephone: (801) 322-2222

Attorneys for Defendants

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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GENTRY GAMBLE,	:	
	:	FINDINGS OF FACT,
Plaintiff,	:	CONCLUSIONS OF LAW
	:	AND ORDER
vs.	:	
	:	
DANIEL R. LARSEN and	:	
CATHERINE J. WHEELER,	:	Civil No. 970901796
	:	Judge Pat B. Brian
Defendants.	:	

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The above-captioned matter came before the court on the 9th day of May, 1997 before the Honorable Pat B. Brian, plaintiff appearing in person and through counsel, Frederick N. Green, and defendants appearing in person and through counsel, William W. Downes, Jr. The court reviewed plaintiff's Complaint, the Certified Consent of Father Giving up Rights to Children Conceived Within Marriage and the Decree of Adoption. Based thereon, and for good cause appearing, the court hereby enters its:

### FINDINGS OF FACT

1. On February 24, 1995, Daniel R. Larsen filed a Petition in the Third Judicial District Court to adopt Trevor Wheeler Gamble and Baron Wheeler Gamble, the natural children of his spouse, Catherine J. Wheeler. In the Matter of the Adoption of Trevor B. Wheeler Gamble and Baron G. Wheeler Gamble, Third District Court Case No. 952900102AD (Judge J. Dennis Frederick).

2. On March 20, 1995, Gentry Gamble, the childrens' natural father, signed the Certified Consent of Father Giving up Rights to Children Conceived Within Marriage and Waiver of Notice.

3. The Certified Consent provides a warning at the top of the document as follows:

DO NOT SIGN THIS DOCUMENT WITHOUT READING IT. IF YOU HAVE ANY QUESTIONS WHATSOEVER, MAKE SURE YOU CONSULT WITH AN ATTORNEY BEFORE SIGNING THIS DOCUMENT. BY SIGNING THIS DOCUMENT, YOU ARE GIVING UP YOUR RIGHTS AS A PARENT. YOU CANNOT REVOKE THE CONSENT TO YOUR CHILDREN'S ADOPTION ONCE YOU SIGN THIS DOCUMENT.

4. Paragraph 7 of the Certified Consent provides:

[Plaintiff] understands that from the time the final decree of adoption is entered, pursuant to Utah Code Ann. Section 78-30-11 (1990, as amended), he will be released from all future parental duties toward and all future responsibilities for the adopted children, and have no further rights with regard to the children.

5. Paragraph 8 of the Certified Consent of Father provides:

[Plaintiff] understands that from the time the final decree of adoption is entered, pursuant to Utah Code Ann. Section 78-30-9 (1990, as amended), that the children will be adopted by the petitioner and the children shall be regarded and treated in all respects as the children of the petitioner and Catherine Wheeler.

6. Paragraph 10 of the Certified Consent of Father provides:

[Plaintiff] has had the opportunity to consult with and obtain the advice of an attorney of his choice.

7. The Decree of Adoption entered on April 27, 1995 by the Honorable J. Dennis Frederick provides, at paragraph 4: "All rights and interests of Gentry Gamble with regard to Trevor and Baron are hereby and forever terminated."

8. Plaintiff's Complaint references a letter from the law firm of Cohne, Rappaport & Segal to plaintiff wherein plaintiff was advised: "You may maintain the present visitation schedule with Trevor and Baron."

9. The Complaint does not reference, nor did plaintiff present at oral argument, any other documents to further establish or define any ongoing visitation agreement between the parties.

10. Plaintiff sought leave of court to file an Amended Verified Complaint alleging an additional cause of action styled as "Specific Performance and Breach of Contract."

Plaintiff alleges the existence of contractual visitation rights that have been breached by the defendants.

Based upon the foregoing Findings of Fact, the court hereby makes and enters the following:

CONCLUSIONS OF LAW

1. Under principles of contract law, the language of the Certified Consent and the Decree of Adoption is clear and unequivocal. Plaintiff Gentry Gamble understood and agreed to relinquish all rights to the adopted children.

2. Pursuant to the Decree of Adoption granted on April 27, 1995, all rights and interests of plaintiff with regard to these children were forever terminated.

3. When read in conjunction with the clear and unequivocal language of the Certified Consent and Decree of Adoption, the referenced letter does not create in plaintiff any legally enforceable right with regard to the adopted children.

4. The visitation language in the attorney's letter is insufficient in light of the adoption papers to create a contract for post-adoption visitation. The attorney's letter does not define the visitation schedule, explain how the visitation schedule could be modified, provide an enforcement mechanism or preclude the defendants from terminating the visitation schedule.

5. As the natural parents of these children pursuant to the Decree of Adoption, defendants may terminate any contact between their children and plaintiff.

6. Plaintiff's First Cause of Action seeking to set aside the Decree of Adoption pursuant to Rule 60(b) of the Utah Rules of Civil Procedure should be dismissed with prejudice for failing to state a cause of action upon which relief may be granted.

7. Plaintiff's Second Cause of Action seeking to enforce or establish visitation with defendants' children should be dismissed with prejudice. In light of Judge Frederick's termination of plaintiff's parental rights with these children, plaintiff lacks standing to seek or enforce visitation rights after the Decree of Adoption became final on April 27, 1995.

8. Plaintiff's Third Cause of Action seeking to terminate defendants' parental rights pursuant to Utah Code Ann. Section 78-3(a)-401, et. seq., should be dismissed for lack of subject matter jurisdiction. The juvenile courts of this state have exclusive original jurisdiction over such actions.

9. Plaintiff's motion to amend the Complaint should be denied as futile since the Amended Complaint likewise fails to state a claim upon which relief may be granted for the reasons stated above.

ORDER

Based upon the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendants' Motion to Dismiss the Complaint is granted.
2. Plaintiff's Motion to Amend the Complaint is denied.
3. Plaintiff's Complaint is dismissed with prejudice.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

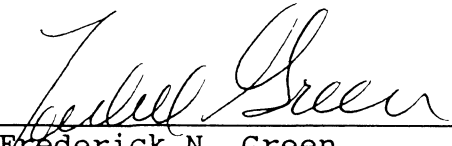
BY THE COURT:

\_\_\_\_\_  
Pat B. Brian, Judge

Approved as to form:

GREEN & BERRY

By

  
\_\_\_\_\_  
Frederick N. Green  
Attorney for Plaintiff

Tab B

---

# COHNE RAPPAPORT & SEGAL

---

A PROFESSIONAL CORPORATION

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Erk Strindberg  
Clifford C. Ross  
Jeffrey R. Oritt  
Daniel J. Torkelson  
Leslie Van Frank  
Kevin J. Fife  
Ralph E. Chamness*

March 8, 1995

Gentry Gamble  
4700 South 900 East, Suite 30-146  
Salt Lake City, Utah 84117

Re: Adoption of Trevor and Baron

Dear Mr. Gamble:

Catherine has informed me that you have agreed to voluntarily consent to Dan's adoption of Baron and Trevor. In accordance with your agreement, I have prepared and filed Dan Larsen's Petition for Adoption. Under Utah law, this Petition must be served upon you or you must agree to accept service. It is my understanding that you have agreed to accept service and I have prepared an Acceptance of Service for your signature.

Enclosed you will find a copy of the Petition for Adoption, a Notice of Petition of Adoption and your Consent to Adoption. The Consent is the document you will sign to agree to Dan's adoption of Trevor and Baron. I will make arrangements for you to sign this document and the Acceptance of Service in front of a notary public and that notary public will return these documents to me. I will be sending you further correspondence and calling you on the telephone regarding this procedure, which will be handled in a confidential manner. In the interim, you should review the Consent and take it to an attorney for his or her review if you so desire. Once the Consent is signed, it is irrevocable.

When the adoption has become final, I will file a satisfaction of judgment regarding the Order on Order to Show Cause previously entered against you. In addition, if any negative credit history appears because of this judgment, we will arrange for that to be removed from your credit report. It is my understanding that Trevor and Baron are to retain the surname Wheeler Gamble during the period of their minority. Also, you may maintain the present visitation schedule with Trevor and Baron. Finally, once your parental rights are terminated, you are under no continuing obligation to provide any support for Trevor and Baron.




Gentry Gamble  
March 8, 1995  
Page 2

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I appreciate your willingness to work with Catherine and me on this matter. If you have any questions or concerns, please do not hesitate to call me. I will be contacting you shortly to make arrangements for the signing of your Consent and Acceptance of Service.

Very truly yours,

**COHNE, RAPPAPORT & SEGAL P.C.**



Kevin J. Fife

KJF:mm  
Enclosures  
cc: Catherine Wheeler

Tab C

FREDERICK N. GREEN (1240)  
GREEN & BERRY  
Attorney for Plaintiff  
622 Newhouse Building,  
10 Exchange Place  
Salt Lake City, Utah 84111  
Telephone: (801) 363-5650

THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, DIVISION I, SALT LAKE DEPARTMENT

---

GENTRY GAMBLE

Plaintiff,

vs.

DANIEL R. LARSEN AND  
CATHERINE J. WHEELER,

Defendant.

**PROPOSED AMENDED  
VERIFIED COMPLAINT**

**Civil No. 970901796**

**Judge Pat B. Brian**

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The Plaintiff complains of the Defendants, and each of them,  
and alleges in support thereof as follows:

1. The Plaintiff is a resident of Salt Lake County, State  
of Utah.

2. The Defendants are husband and wife and are each  
residents of Salt Lake County, State of Utah.

3. Gentry Gamble is the natural father of Trevor B.  
Wheeler Gamble (hereinafter "Trevor"), born February 10, 1987;  
and Baron G. Wheeler Gamble (hereinafter "Baron"), born July 24,  
1985.

4. The Plaintiff and Defendant Catherine Wheeler were  
husband and wife, which marriage was divorced by Decree of this

Court, dated on or about April 14, 1989, *Catherine Wheeler v. Gentry Gamble*, Civil No. 884903729DA. See Exhibit "A" attached hereto and incorporated herein by this reference.

5. In that Divorce Decree, Catherine Wheeler was awarded the permanent care, custody and control of the children, Baron and Trevor, subject to the reasonable rights of visitation as particularly described therein in favor of Gentry Gamble.

6. The Plaintiff herein was ordered to pay \$200.00 per month, per child as and for child support.

7. The Defendants married on March 1, 1991.

8. Due to circumstances beyond the control of the Plaintiff herein, he became in arrears on child support payments. The arrears resulted from the failure of the Plaintiff's business and a coincident illness which rendered him insolvent in 1993.

9. In spite of this, and at all times since the granting of the Decree of Divorce, Gentry Gamble has maintained a close relationship with Baron and Trevor and has maintained a parental relationship with the two children, making payments in 1994 of \$400.00 in child support plus \$100.00.

10. Following the Defendants' marriage, the Defendant Daniel R. Larsen petitioned the Court to adopt Baron and Trevor by way of a Petition, dated February 24, 1995.

11. The Defendants approached Gentry Gamble to obtain his consent as the natural father of Baron and Trevor for their adoption by Defendant Daniel Larsen, and in the course of

negotiations regarding that request, Gentry Gamble, based upon the representations, promises and in consideration of the parties' agreement, granted his consent to the adoption and executed a Consent which was filed with the court. Based upon the Consent, the Petition of Daniel R. Larsen to adopt Trevor and Baron was granted on or about April 27, 1995. See Decree of Adoption, marked Exhibit "B" attached hereto and incorporated herein by this reference.

12. Prior to Gentry Gamble's Consent for the adoption, the Defendants agreed, in writing, individually and through their agent, for Gentry Gamble to maintain the present visitation schedule with Trevor and Baron, subsequent to the adoption. See letter of Kevin J. Fife, dated March 8, 1995, marked Exhibit "C" and attached hereto and incorporated herein by this reference.

13. The present visitation schedule was roughly defined by the Decree of Divorce and included alternating weekend visitation, extended visitation as well as visitation on holidays, during the mid-week, and at other agreed upon times.

14. Furthermore, as part of the parties' bargain and agreement, the Defendants agreed to satisfy any judgment or claim they had for child support arrearages.

15. Prior to the parties' agreement and prior to the Decree of Adoption based upon Plaintiff's consent, the Defendant's had threatened Gentry Gamble with not only civil prosecution for failure to pay his child support, but criminal liability and prosecution as well.

16. Since the granting of the Decree of Divorce, the parties had abided by their agreement, that is:

- (a) the Defendants did execute a Satisfaction of Judgment as to child support arrearages and claims; and,
- (b) the Defendants have provided for and allowed Gentry Gamble to continue to exercise the visitation schedule that the Defendants had adopted.

17. Prior to and since the Decree of Adoption, the relationship between Gentry Gamble and his sons, has continued, and has, in fact, become more mature and meaningful. In spite of the Decree of Adoption, Baron and Trevor continue to look to Gentry as their father and the emotional parent/child bond between them has continued and has not been altered.

18. Consistent with the Defendants' agreement, and their practice of visitation since the Decree of Adoption, the Plaintiff and his sons have continued to enjoy visitation, holidays, Father's Day, as well as numerous family celebrations and experiences, all of which are consistent with the Defendants' agreement and the parent/child bond and relationship which persists between the Plaintiff and the children.

19. On information and belief, the Plaintiff alleges that the Defendants have failed to inform the court of their agreement with the Plaintiff for ongoing visitation rights with the children at the time of the granting of the Petition for Adoption.

20. On or about the 19th day of January, 1997, the Defendants arbitrarily, without just cause, and contrary to the

acknowledged best interest of Trevor and Baron, unilaterally terminated the Plaintiff's visitation rights with those children.

21. The children have been forbidden to see the Plaintiff.

22. Except for the children's chaperoned visit at the time of the funeral of the Plaintiff's "step-son" there has been no interaction permitted by Defendants by way of personal visits, telephone conversations and the like.

23. The children have been instructed by the Defendants to ignore the Plaintiff and have been threatened with discipline in the event that they disobey the Defendants in this regard.

24. In spite of the informal efforts of the Plaintiff to continue to visit with the children as the parties agreed and have allowed for nearly two years since the adoption, the Defendants, and each of them, have refused.

25. As a result of the Defendants' actions, the children have been denied the ongoing comfort, counsel and benefits of their relationship with their father.

26. The actions of the Defendants are contrary to the best interests of the children, and have been undertaken without the benefit of the Defendants' agreement or consulting with the Plaintiff, much less any court direction or order.

27. Unless the Court grants relief to the Plaintiff as prayed herein, the Defendant will continue in this course of action to the damage of the children, as well as the Plaintiff's rights.

28. The Defendants have threatened the Plaintiff with legal proceedings to restrain him from any further contact with the

children, or the children with the Plaintiff. However, the Plaintiff is unaware of any action commenced by the Defendants in this regard which would in any sense legitimize their unilateral behavior.

29. At the time the Plaintiff executed his Consent the Defendants represented to him that he would continue to maintain the present visitation schedule with his sons. The Plaintiff relied upon that representation at the time he executed the Consent to adoption. The Defendants' representation was critical to the Plaintiff. The Defendants knew full well, at that time, that they had no intention of granting the Plaintiff visitation rights and would, at the slightest provocation, unilaterally assert their technical rights under the Decree of Adoption to deny the Plaintiff any further visitation or any contact whatsoever with the children. Had the Plaintiff known the truth of the Defendants' representation (that they maintained the right to unilaterally terminate the visitation privileges of the Plaintiff), he would never have executed the Consent, nor permitted the adoption to proceed without his objection. By virtue of the foregoing, the Defendants have acted fraudulently.

30. By failing to inform the Court of the parties' agreement, the Defendants have committed a fraud upon the Court and obtained a Decree of Adoption without apprising the court of all of the relevant circumstances.



31. In fact, the Defendants have induced the Plaintiff to give his consent to the adoption of his sons based upon the foregoing promises which are contrary to the representations made to the Court, which were relied upon by the Court, for the granting of the Decree of Adoption.

#### **FIRST CAUSE OF ACTION**

32. The Plaintiff realleges and incorporates herein by this reference as if fully set forth herein all of the allegations contained in paragraphs 1 through 30.

33. The Defendants action is fraudulent, both as to the procurement of the Plaintiff's consent as well as the adoption itself.

34. As such, the Court should rescind and set aside the Decree of Adoption referred to above pursuant to Rule 60(b) Utah Rules of Civil Procedure, as well as the common law of this state.

35. The Court's order rescinding the Decree of Adoption should restore the Plaintiff to his full parental rights as well as his parental obligations, which he is willing, able and anxious to assume.

WHEREFORE, the Plaintiff prays for an Order of the Court rescinding the Decree of Adoption.

#### **SECOND CAUSE OF ACTION**

37. The Plaintiff realleges and incorporates herein by this reference as if fully set forth herein all of the allegations contained in paragraphs 1 through 35.

38. In the event that the Court does not rescind the adoption, it would be in the best interests of the children that the Court restore to the Plaintiff and provide formally and by way of order for the Plaintiff's visitation rights with Trevor and Baron.

39. The Plaintiff's visitation rights should correspond to the rights provided for in the Decree of Divorce referred to above, except as may have been modified by the parties' practice, if at all, since the granting of the Decree of Divorce.

WHEREFORE, in the alternative, the Plaintiff prays for visitation rights with the minor children, Trevor and Baron, consistent with the visitation privileges set forth in the Divorce Decree between the Plaintiff and Defendant, Catherine J. Wheeler.

### **THIRD CAUSE OF ACTION**

#### **Specific Performance and Breach of Contract**

40. The Plaintiff realleges and incorporates herein by this reference as if fully set forth herein all of the allegations contained in paragraphs 1 through 40.

41. The parties agreed for ongoing visitation in consideration of the adoption. The Defendants have breached the agreement by unilaterally terminating the contractual visitation rights of the Plaintiff.

42. The only adequate remedy available at law is that of specific performance.

43. The Defendants should be ordered, per the contract of the parties, to facilitate and permit ongoing contact and visitation.

WHEREFORE, the Plaintiff prays for an order of the court ordering the specific performance of the parties' contract to permit the ongoing visitation and contact between the Plaintiff and the minor children.

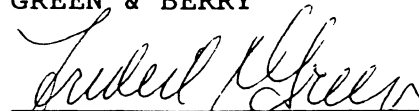
WHEREFORE, the Plaintiff prays for judgment against the Defendant, and each of them, as follows:

1. That the Decree of Adoption be rescinded and set aside.
2. That the Plaintiff be restored his parental rights and obligations.
3. That in the alternative the Plaintiff be restored visitation rights pursuant to the parties' agreement and the equitable powers of the Court which visitation rights would be in the best interest of the children.
4. That the Court enter an order for the specific performance of the parties' contract to permit the ongoing visitation and contact between the Plaintiff and the minor children.
5. For such other and further relief as the Court may deem proper.

DATED THIS 28 day of April, 1997.

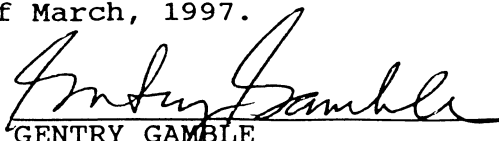
Respectfully Submitted,

GREEN & BERRY




FREDERICK N. GREEN  
Attorney for Plaintiff

DATED THIS 28 day of March, 1997.

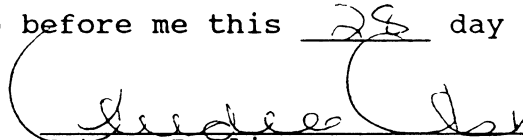
  
GENTRY GAMBLE  
Plaintiff

STATE OF UTAH                     )  
  :SS  
COUNTY OF SALT LAKE         )

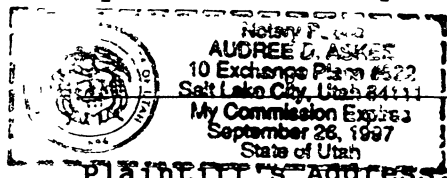
Gentry Gamble, the Plaintiff in the foregoing being first duly sworn upon oath, deposes and says: that he has read the foregoing, knows the contents thereof, that the matters therein are true and correct and based upon information and belief, and as to those, believes them to be true.

  
GENTRY GAMBLE  
Plaintiff

SUBSCRIBED AND SWORN to before me this 28 day of March, 1997.

  
Notary Public  
Residing in Salt Lake County  
State of Utah

My Commission Expires:



Plaintiff's Address:

944 Hyland Lake Drive  
Salt Lake City, Utah 84121

CERTIFICATE OF HAND DELIVERY

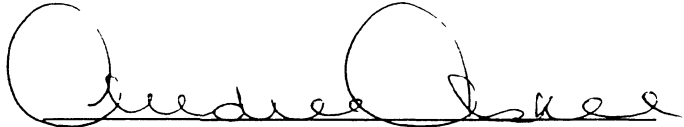
STATE OF UTAH                                 )  
  :SS  
COUNTY OF SALT LAKE                     )

Audree D. Askee, being duly sworn, says:


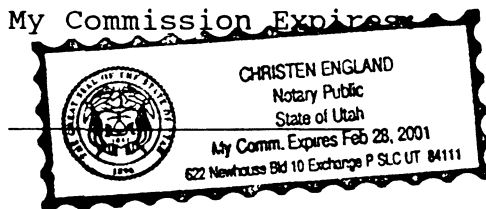
That she is employed in the offices of GREEN & BERRY,  
attorneys for Plaintiff herein, that she served pursuant to Rule  
4-504 of the Code of Judicial Administration, the attached  
AMENDED VERIFIED COMPLAINT upon the following parties by causing  
to be hand delivered a true and correct copy thereof to:

William W. Downes, Jr., Esq.  
Winder & Haslam  
Attorneys for Defendants  
175 West 200 South, Suite 4000  
Salt Lake City, Utah 84110-2668

on the 28 day of April, 1997.



SUBSCRIBED AND SWORN to before me this 28 day of April,  
1997.

  
\_\_\_\_\_  
Notary Public  
Residing in Salt Lake  
County, State of Utah

Tab D

FREDERICK N. GREEN (1240)  
GREEN & BERRY  
Attorney for Plaintiff  
622 Newhouse Building,  
10 Exchange Place  
Salt Lake City, Utah 84111  
Telephone: (801) 363-5650

THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, DIVISION I, SALT LAKE DEPARTMENT

---

GENTRY GAMBLE

Plaintiff,

vs.

DANIEL R. LARSEN AND  
CATHERINE J. WHEELER,

Defendant.

**AFFIDAVIT OF GENTRY GAMBLE,  
DATED APRIL 28, 1997**

**Civil No. 970901796**

**Judge Pat B. Brian**

---

STATE OF UTAH                    )  
                                      : ss  
COUNTY OF SALT LAKE         )

Gentry Gamble, being first duly sworn upon his oath, deposes  
and states as follows:

1. That I am the Plaintiff above named and have filed a  
Verified Complaint.

2. This Affidavit will supplement and augment the Verified  
Complaint as follows.

3. Since the adoption of Trevor and Baron by Daniel R.  
Larsen, my relationship with Trevor and Baron has not changed.  
They still look to me as their father.

4. Our visitation has continued just as it did prior to  
the adoption.

5. The children visit with me on Father's Day. We vacation together. I attend their extracurricular activities and school functions just as I did before. We communicate in writing as we always have.


6. The refusal of the Defendants to permit any contact between the children and myself was abrupt and distressing to me.

7. Based upon my intimate relationship with the boys, I am sure that it is equally distressing for them.


8. This behavior of the Defendants is consistent with the abusive behavior that was reported to me, and others, regarding the Defendants and how they "discipline" and limit the reasonable activities of the children.

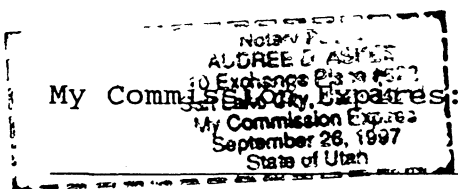
9. Attached hereto and marked Exhibits "A" through "G" are photographs taken since the adoption, as well as correspondence, cards, and the like that I have received from the children, since the adoption.

DATED THIS 28 day of April, 1997.

  
GENTRY GAMBLE  
Affiant

SUBSCRIBED AND SWORN to before me this 28 day of April, 1997.

  
Notary Public  
Residing in Salt Lake  
County, State of Utah





CERTIFICATE OF HAND DELIVERY

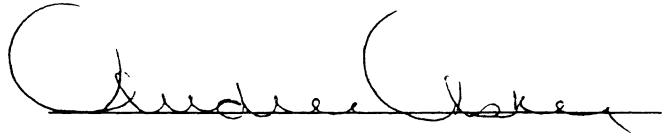
STATE OF UTAH                                 )  
  : ss  
COUNTY OF SALT LAKE                     )

Audree D. Askee, being duly sworn, says:


That she is employed in the offices of GREEN & BERRY,  
attorneys for Plaintiff herein, that she served pursuant to Rule  
4-504 of the Code of Judicial Administration, the attached  
AFFIDAVIT OF GENTRY GAMBLE, DATED APRIL 28, 1997 upon the  
following parties by causing to be hand delivered a true and  
correct copy thereof to:

William W. Downes, Jr., Esq.  
Winder & Haslam  
Attorneys for Defendants  
175 West 200 South, Suite 4000  
Salt Lake City, Utah 84110-2668

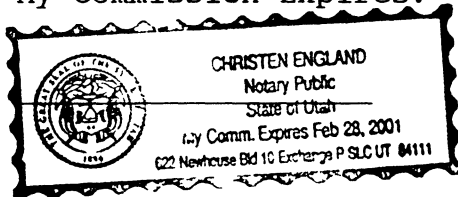
on the 28 day of April, 1997.

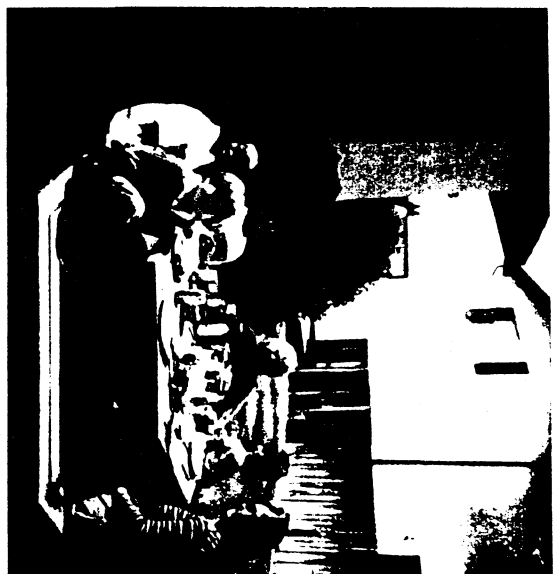
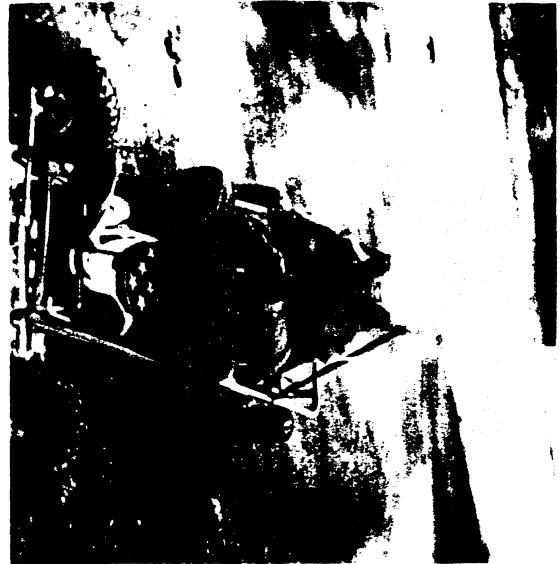
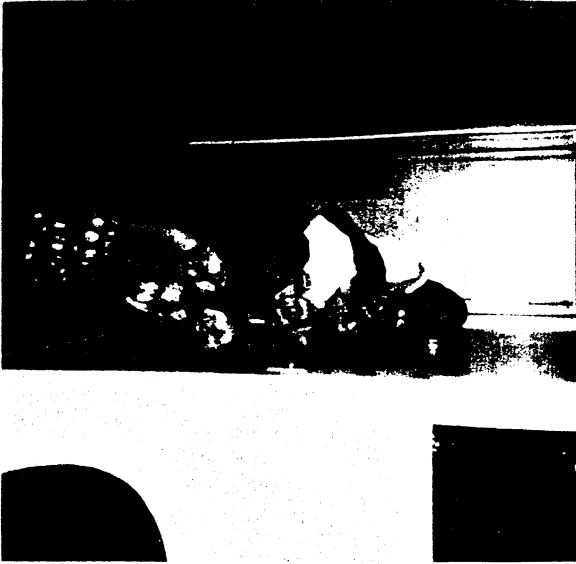


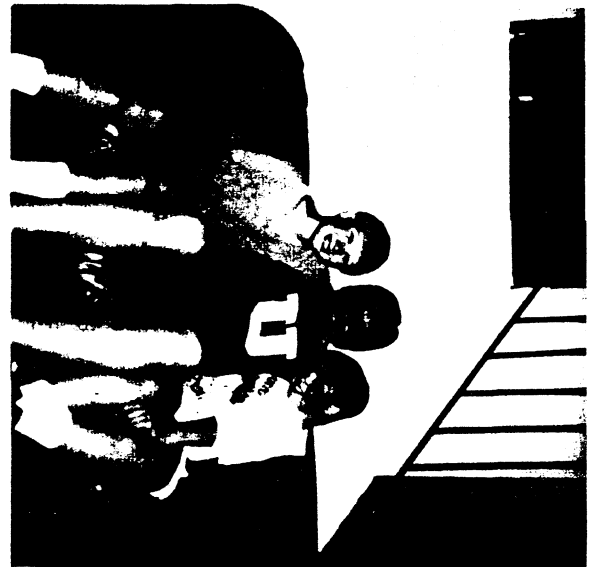
SUBSCRIBED AND SWORN to before me this 28 day of April,  
1997.

  
Notary Public  
Residing in Salt Lake  
County, State of Utah

My Commission Expires:

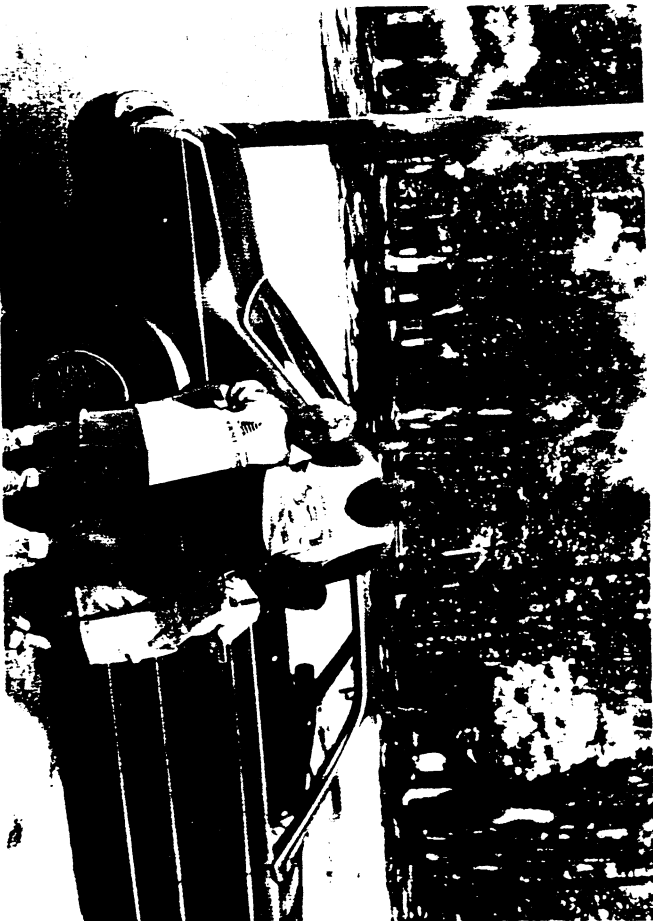
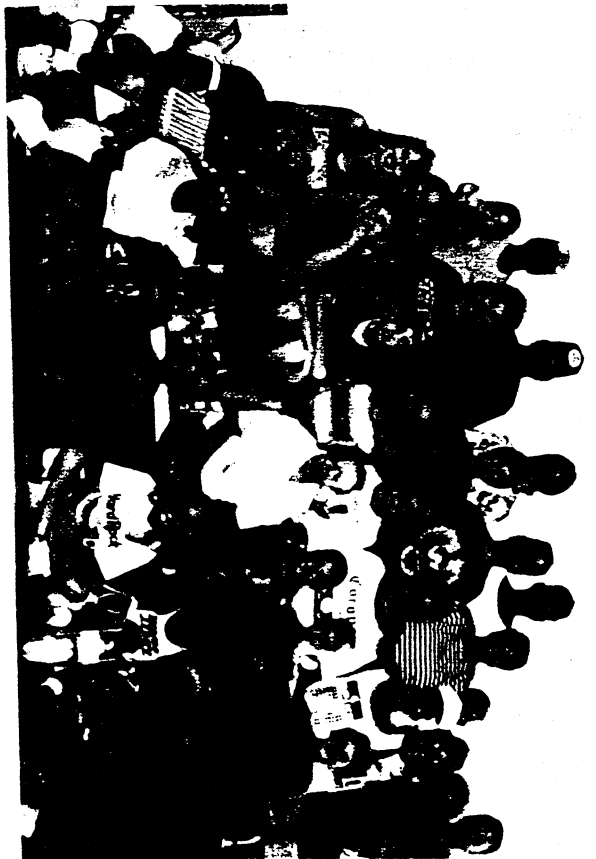
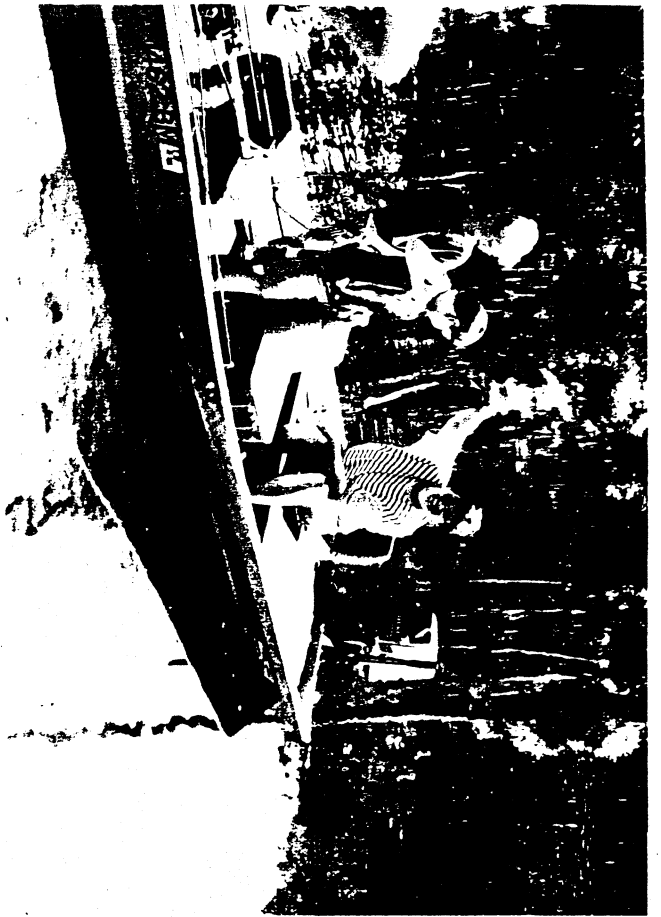


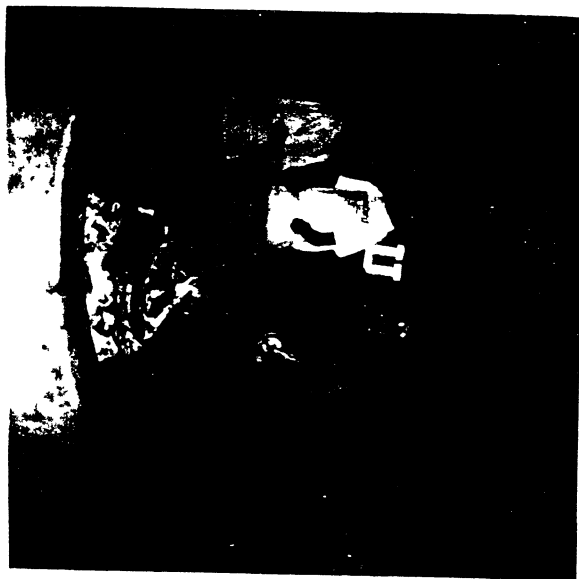
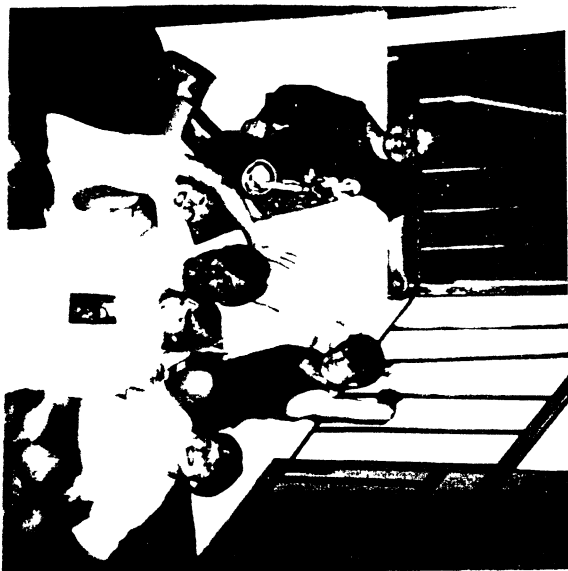




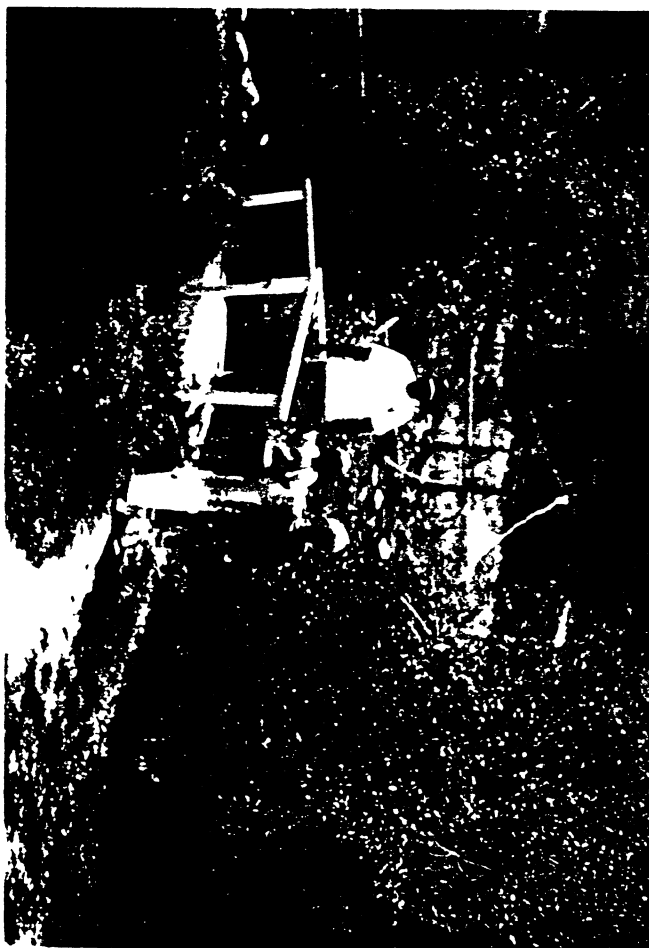
Hey Aaron  
and Aaron  
Merry in my  
Loot outside  
THANKS for looks  
ST. Nick  
ST. Nick



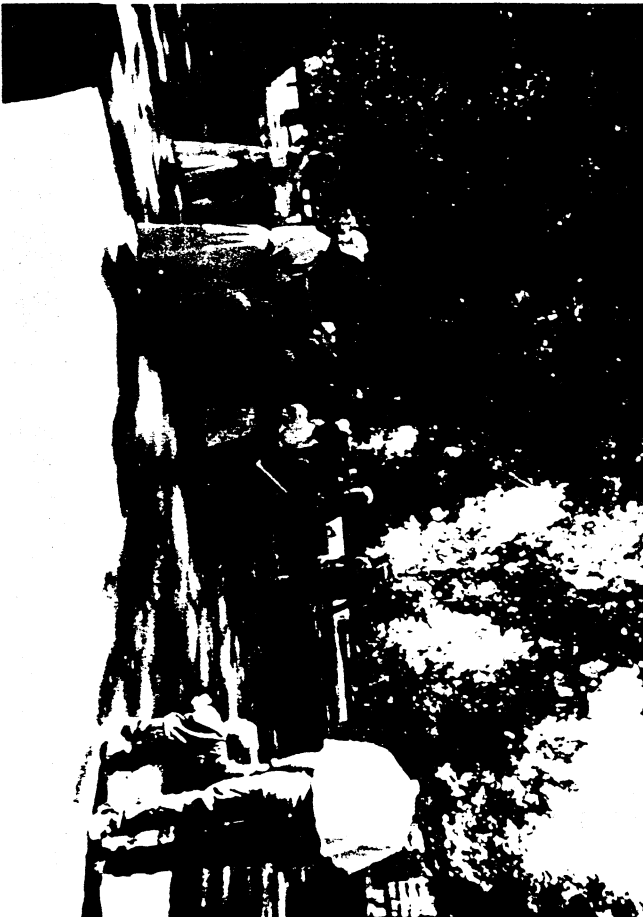




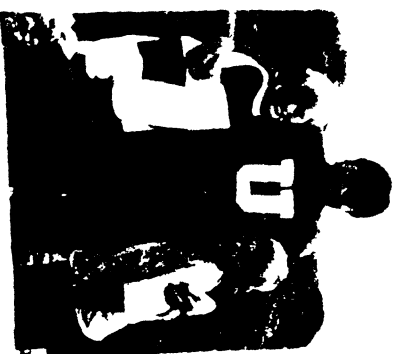


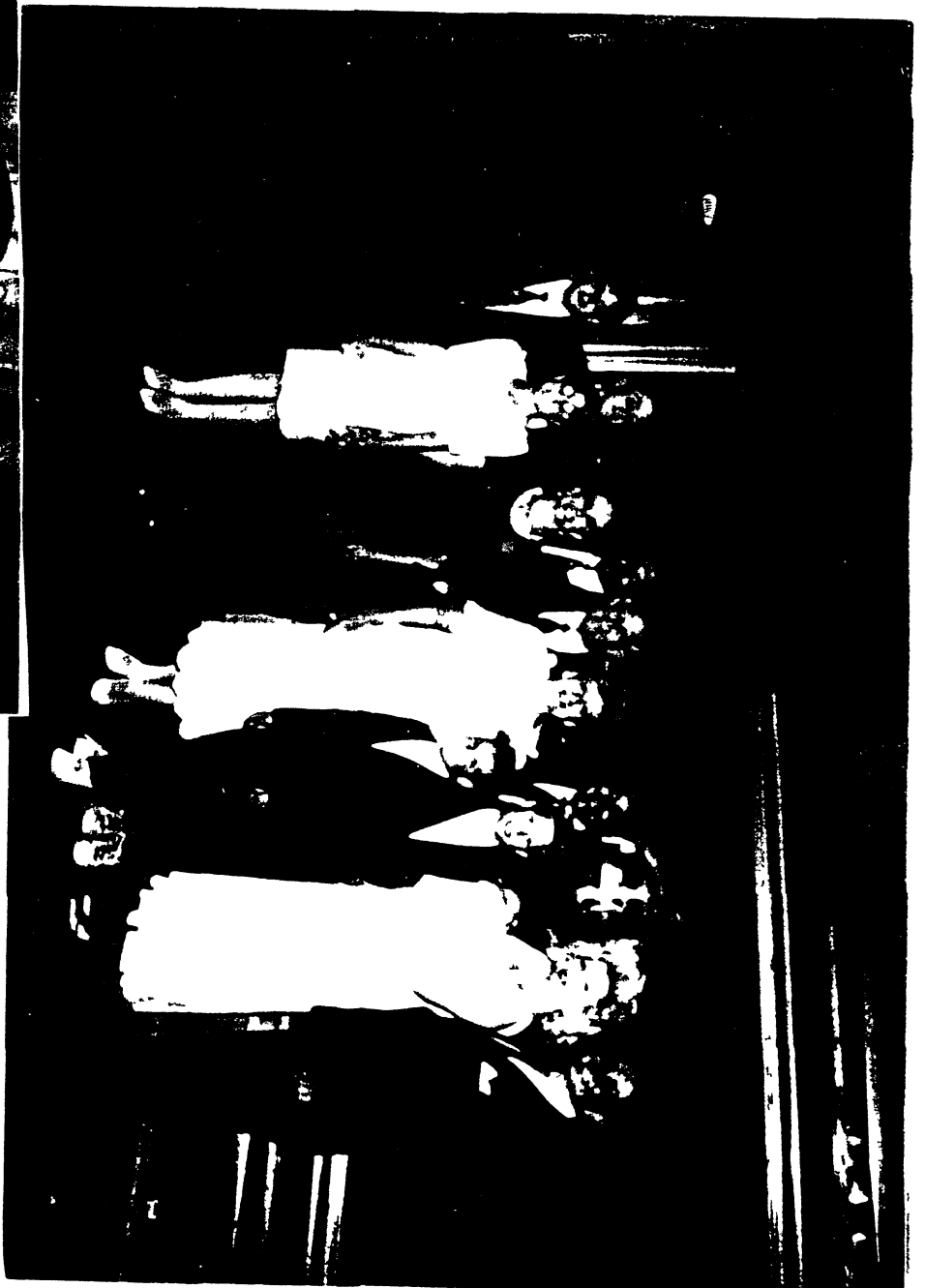






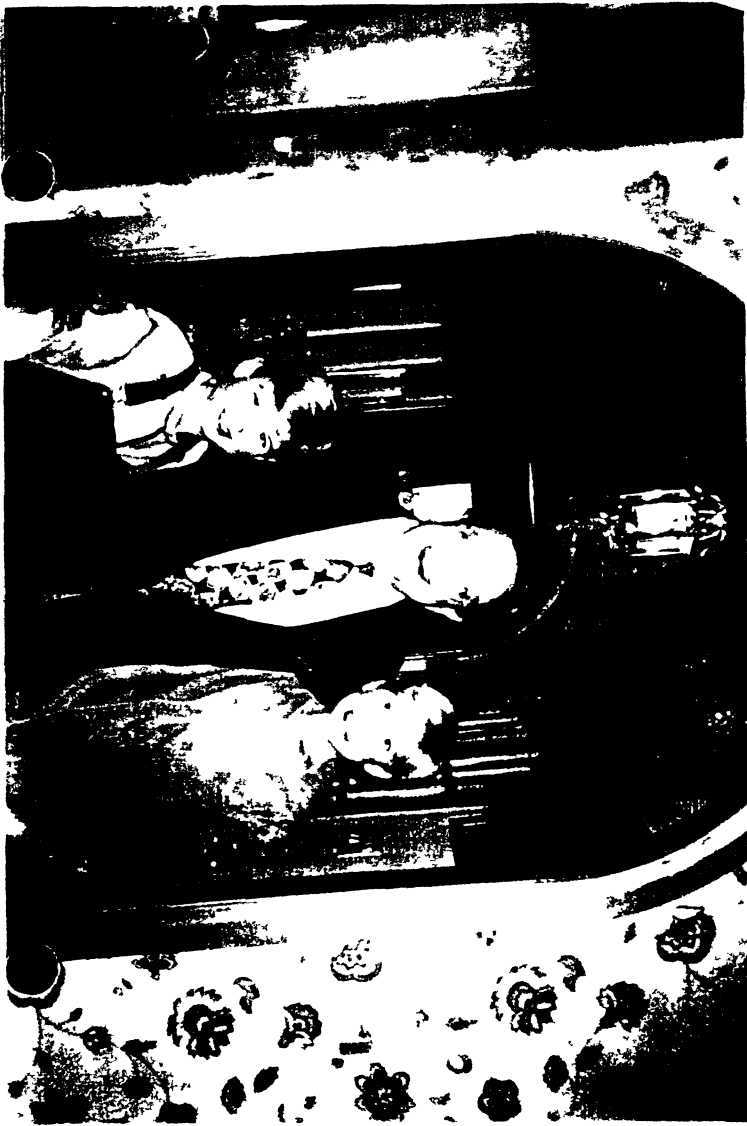


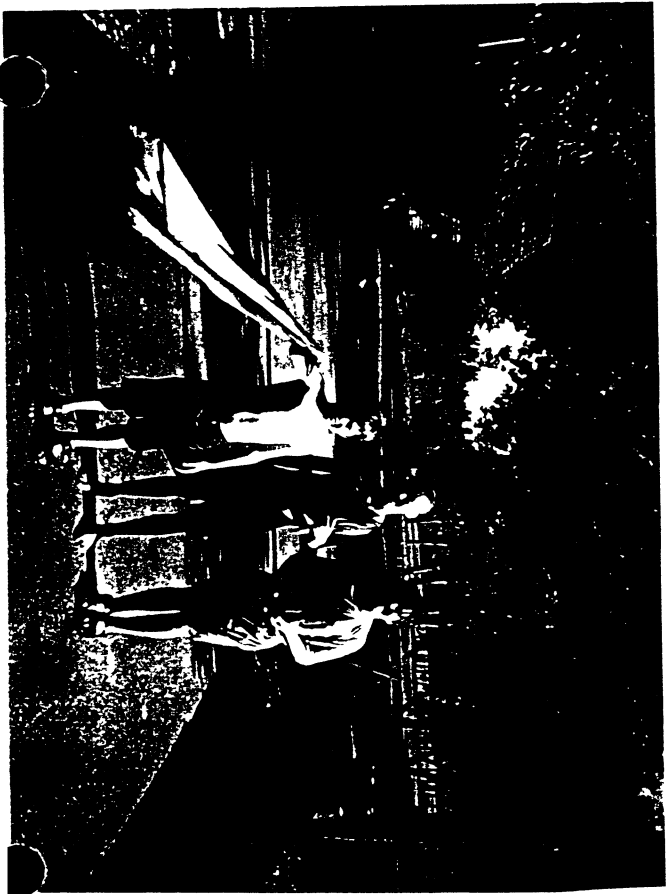
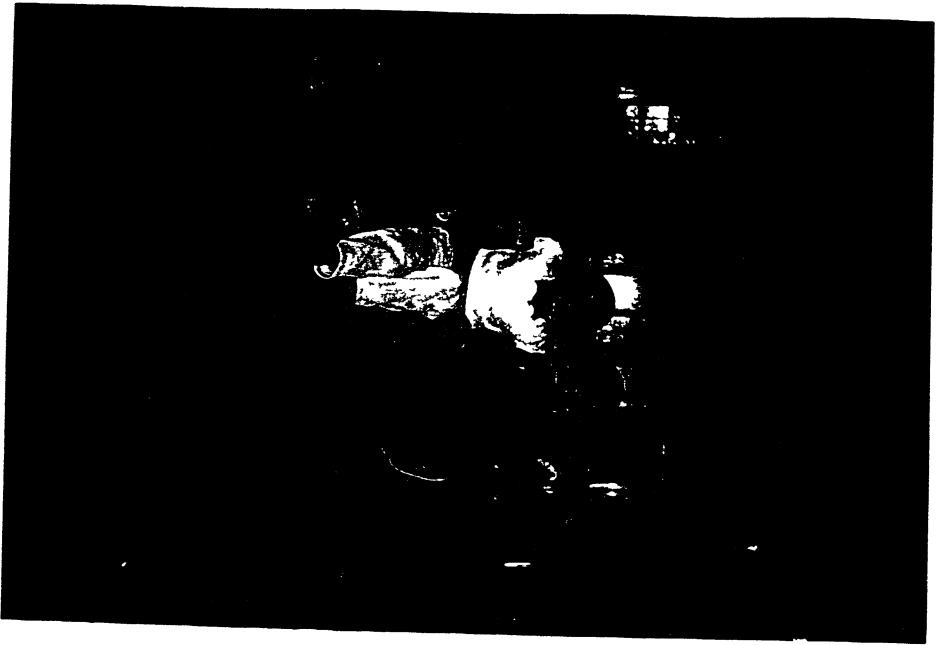




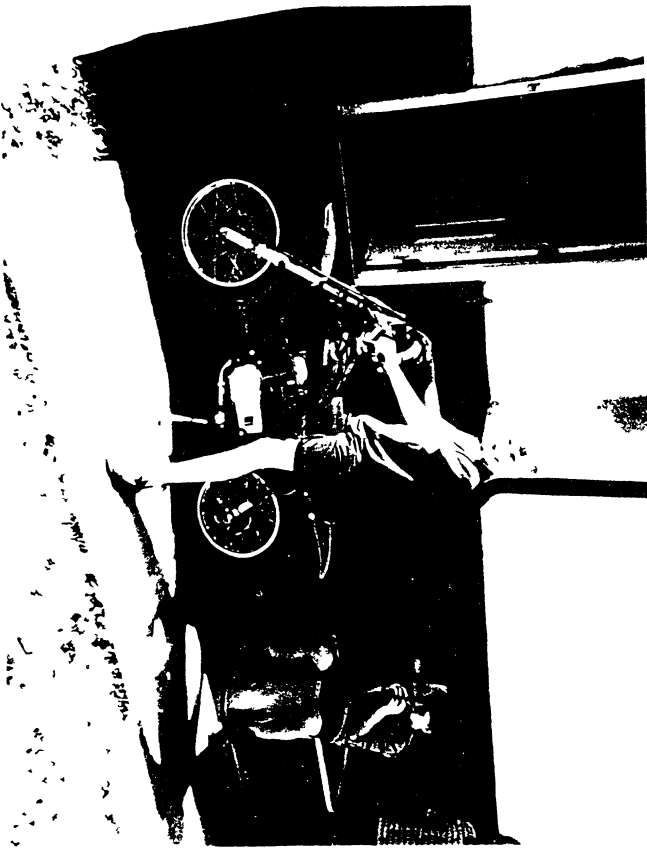


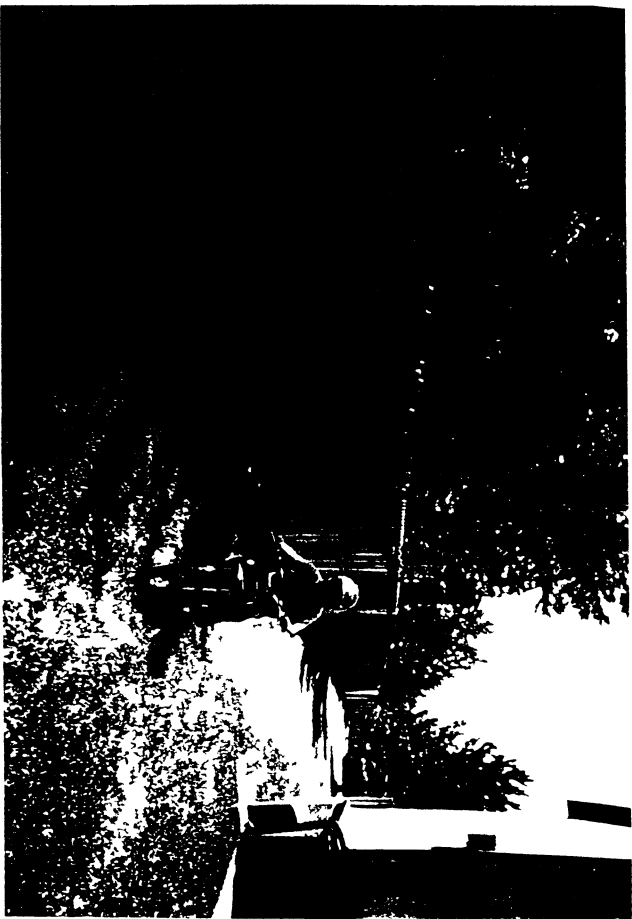
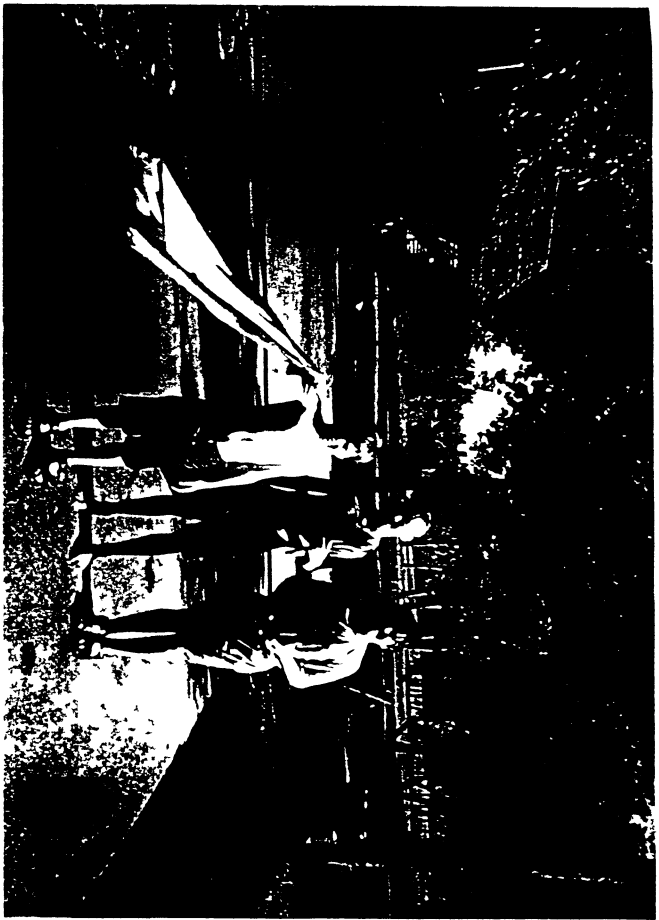


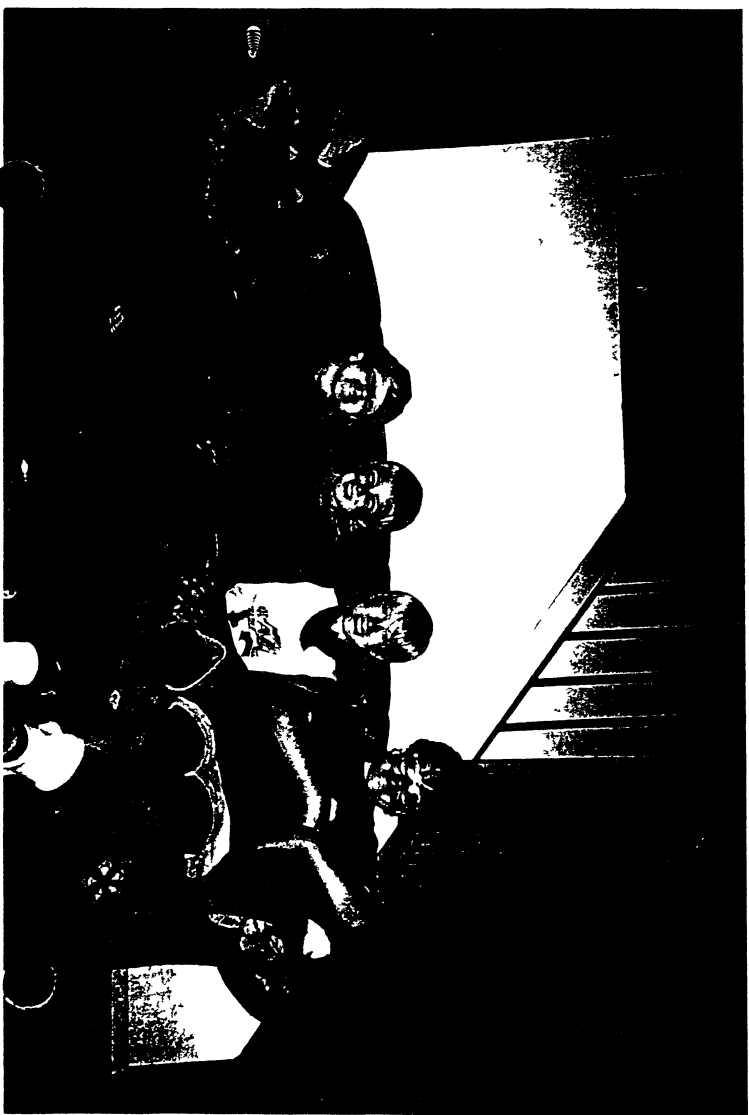


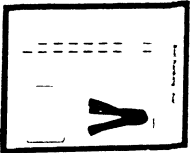
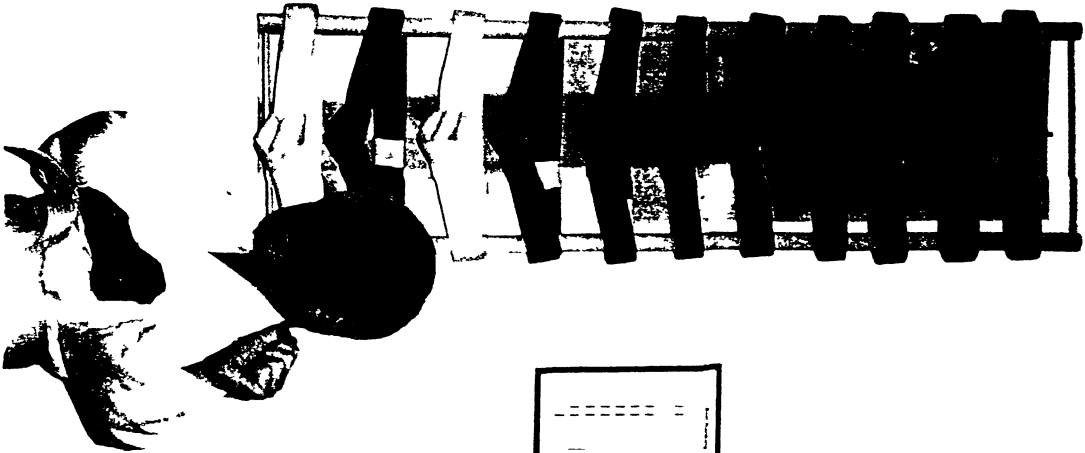
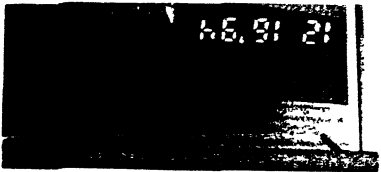


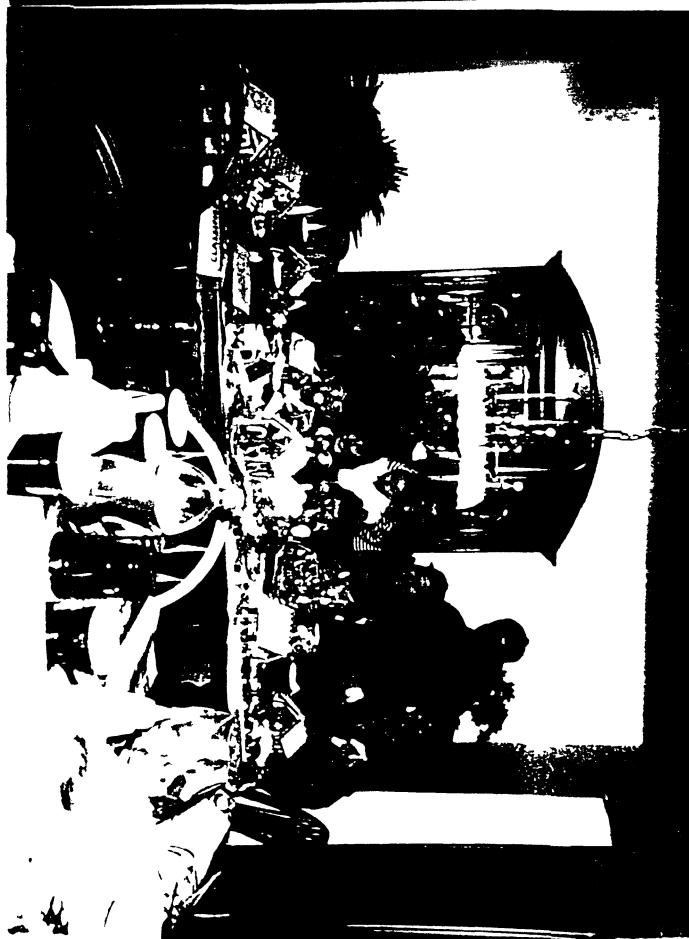


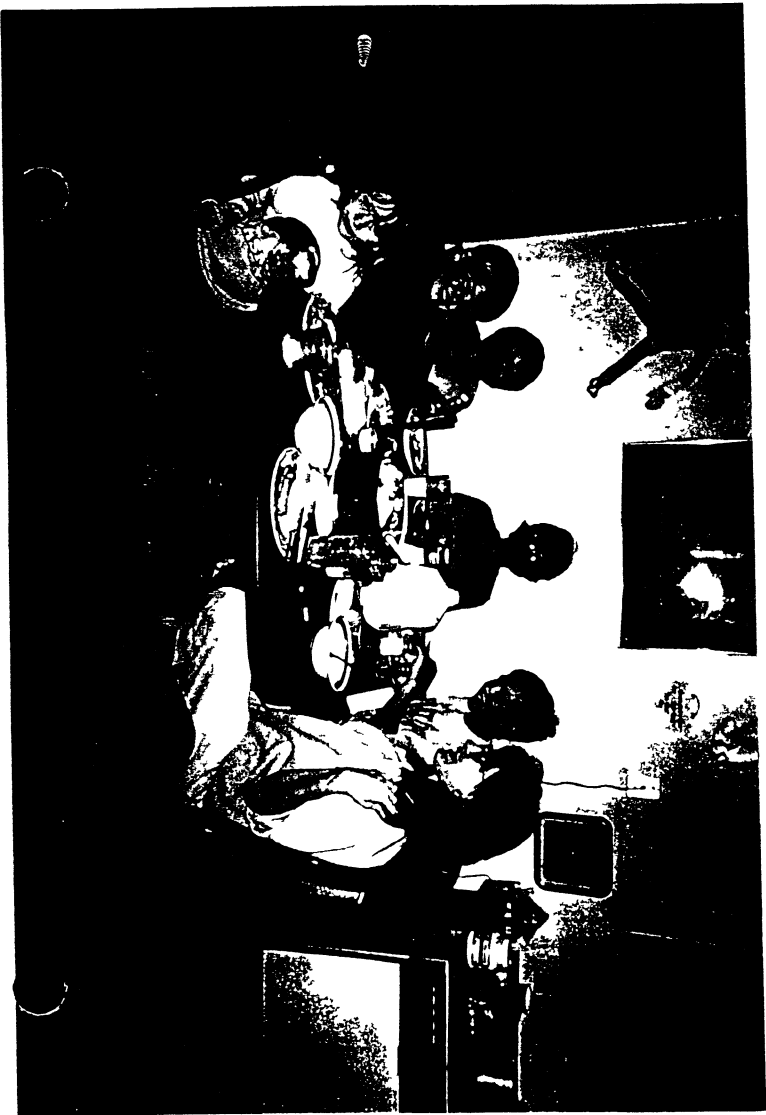
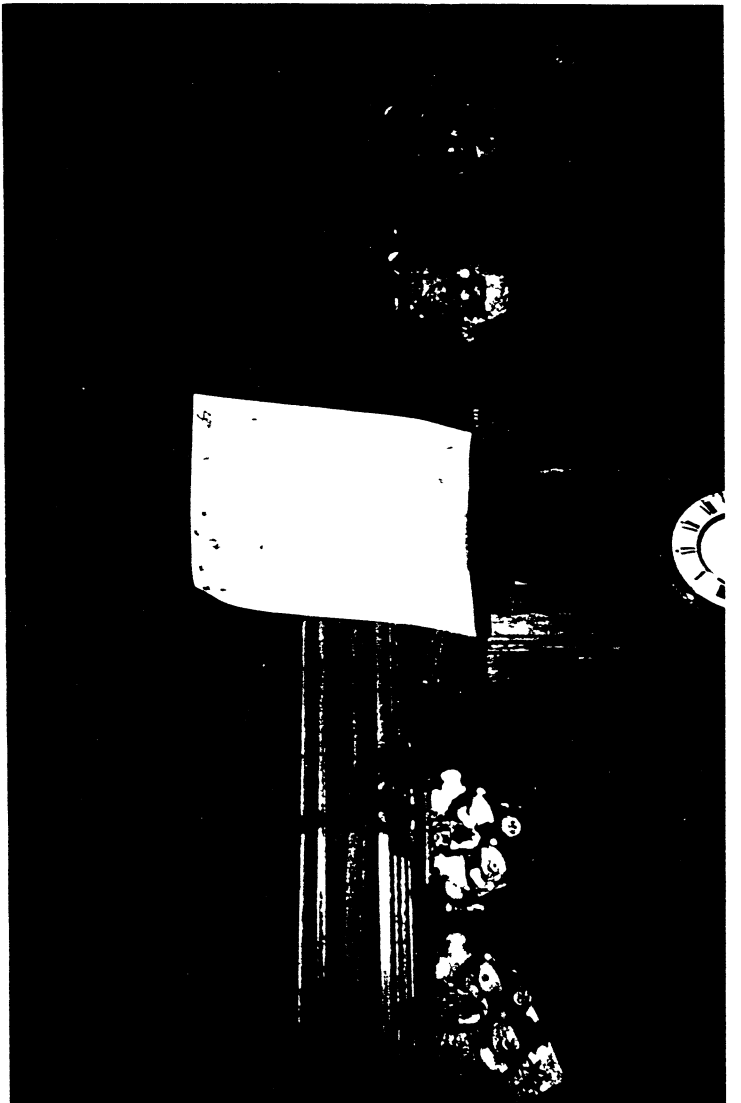




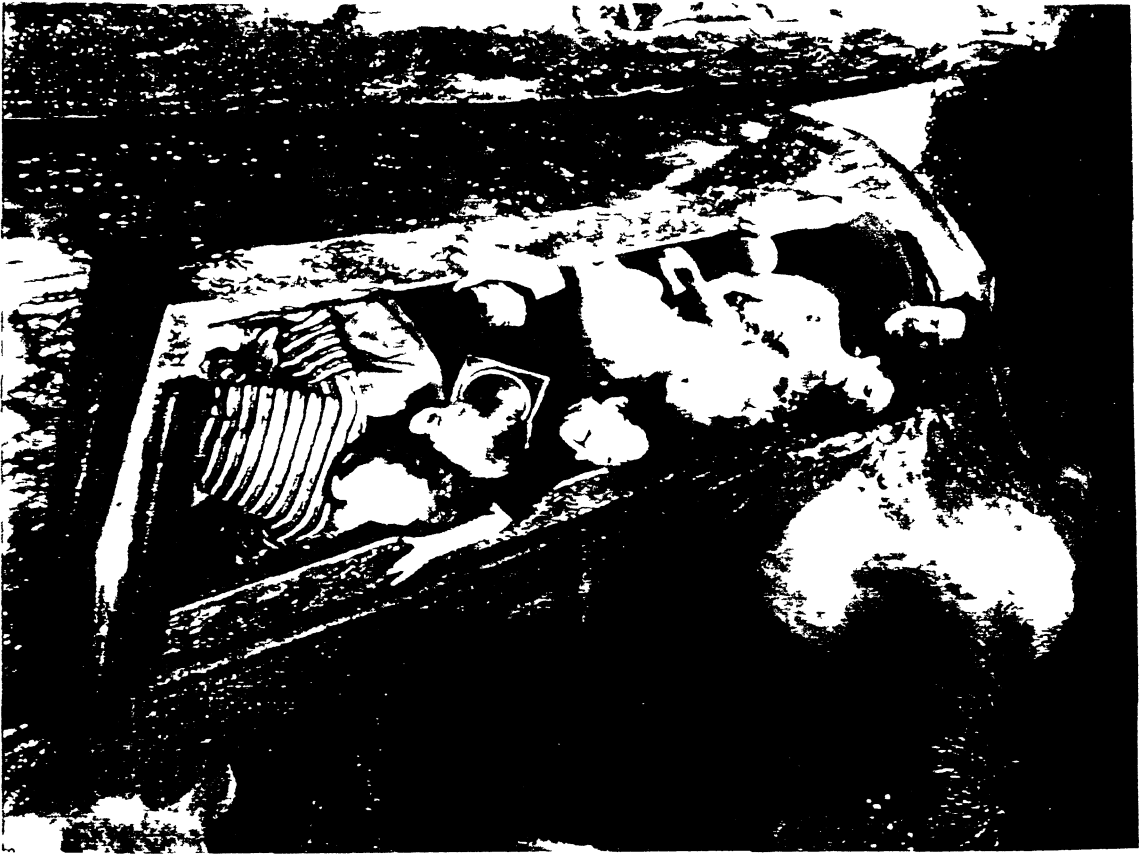




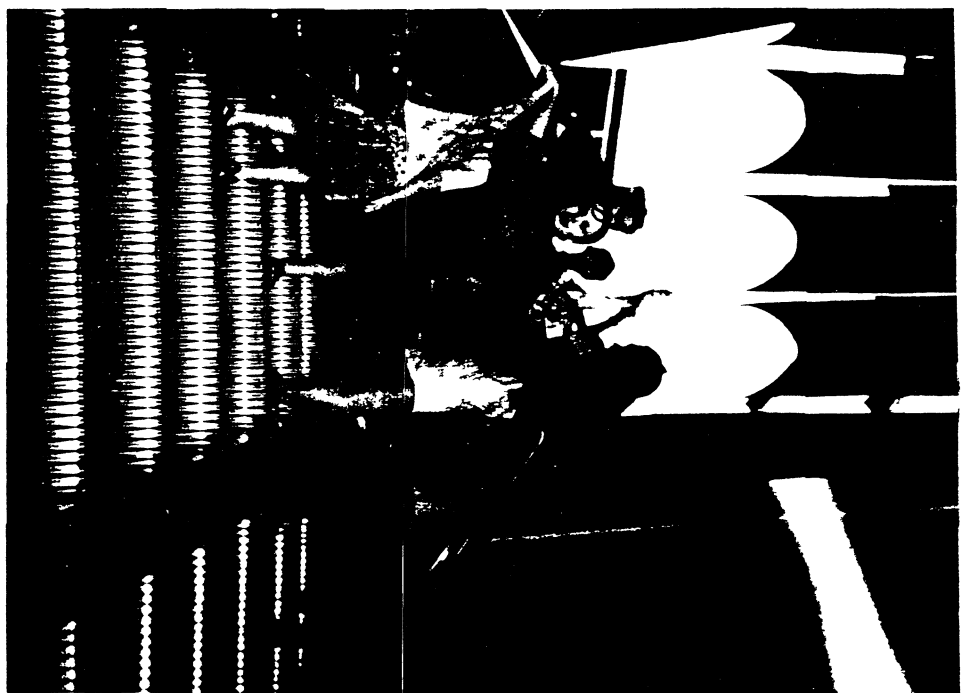


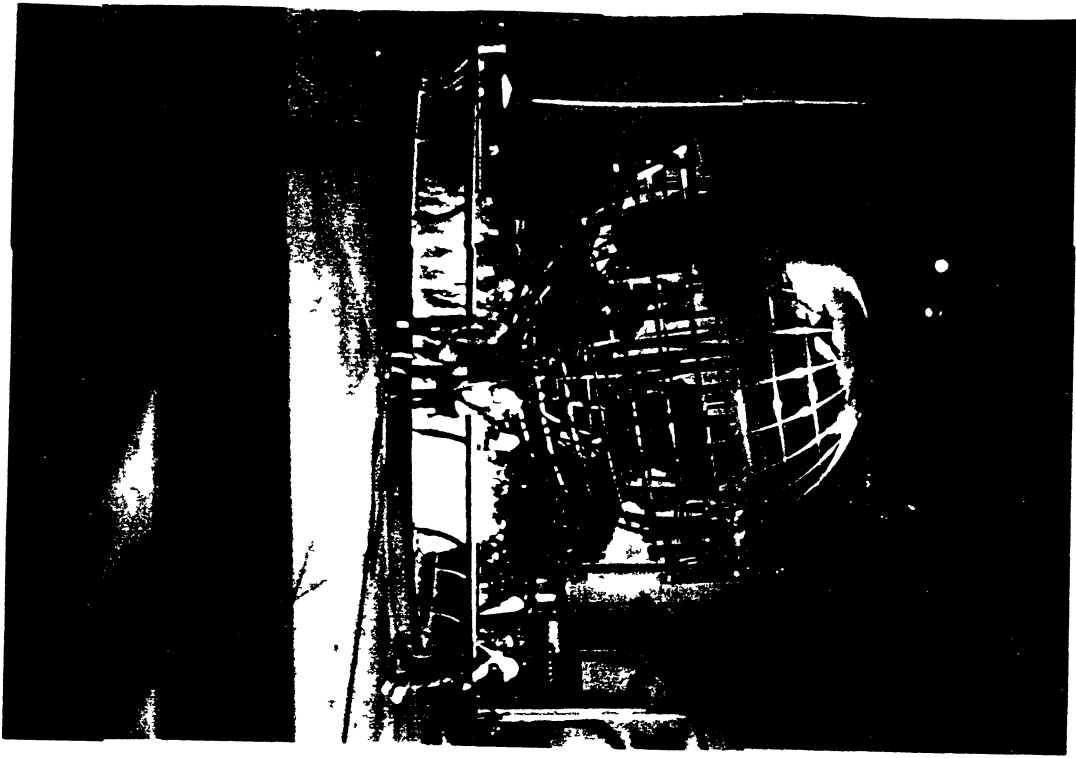


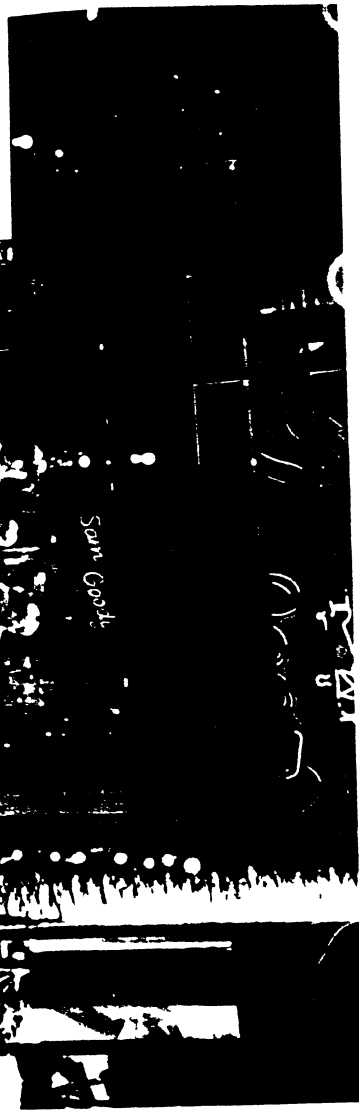


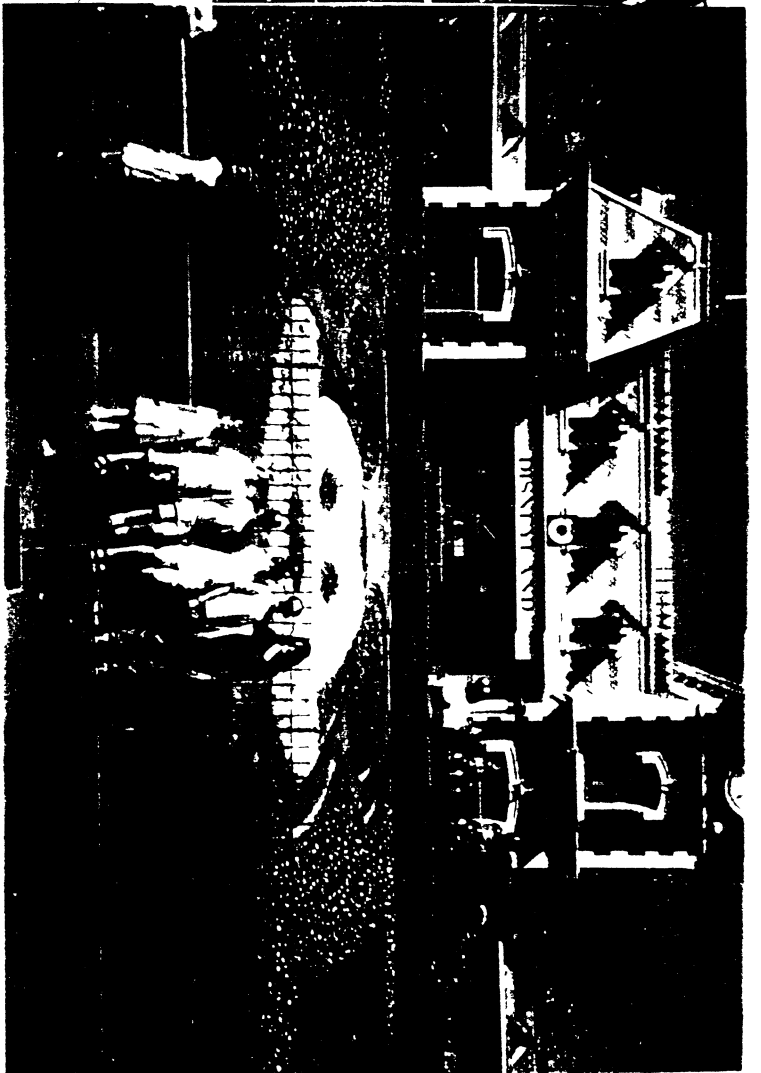


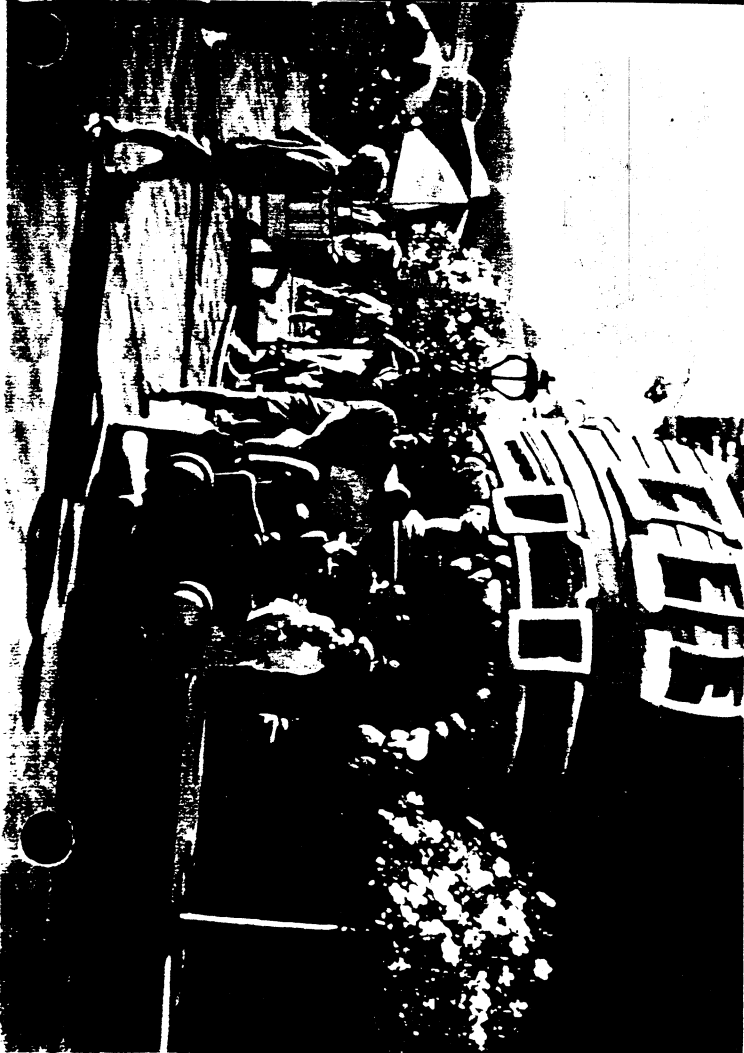
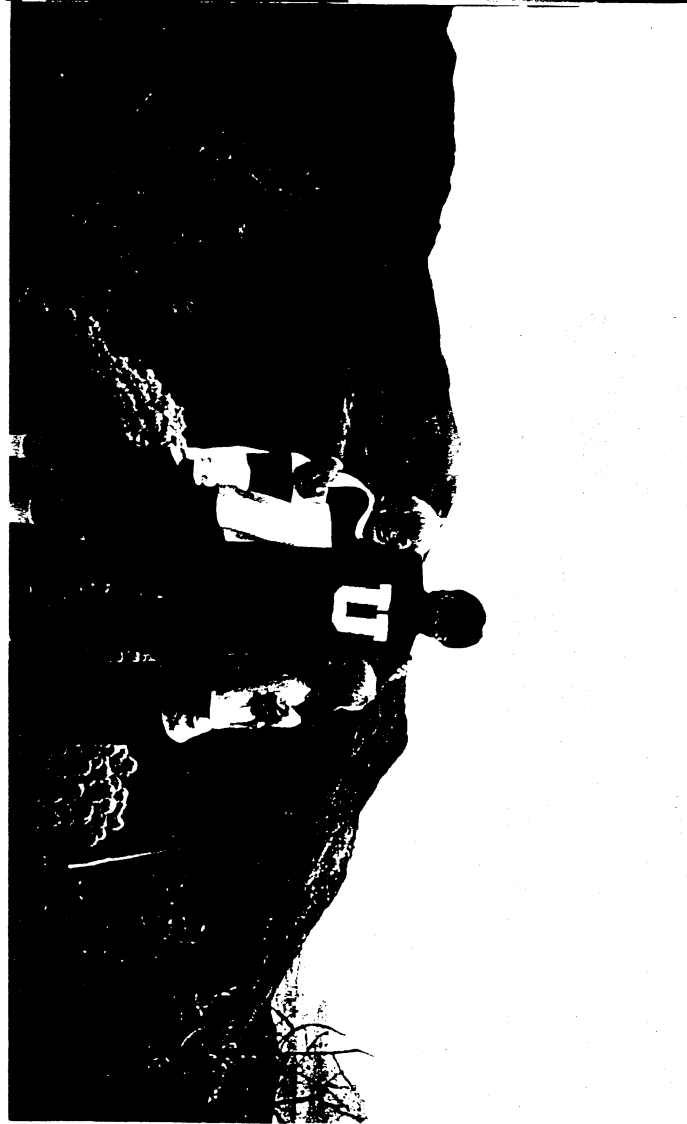


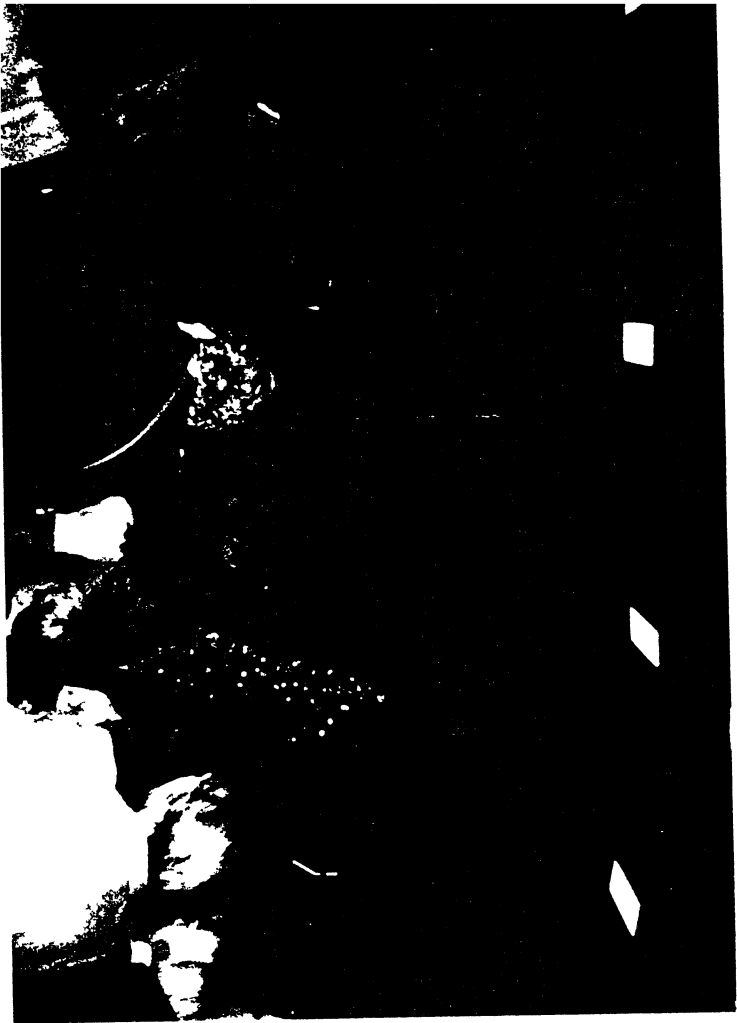








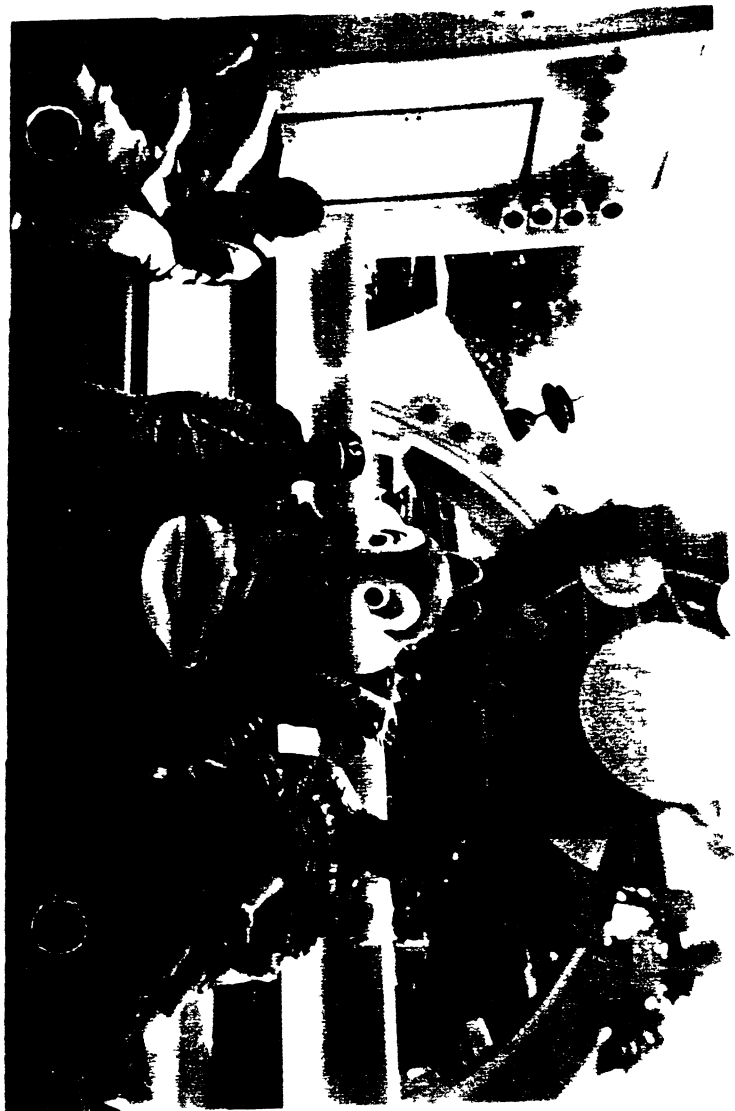


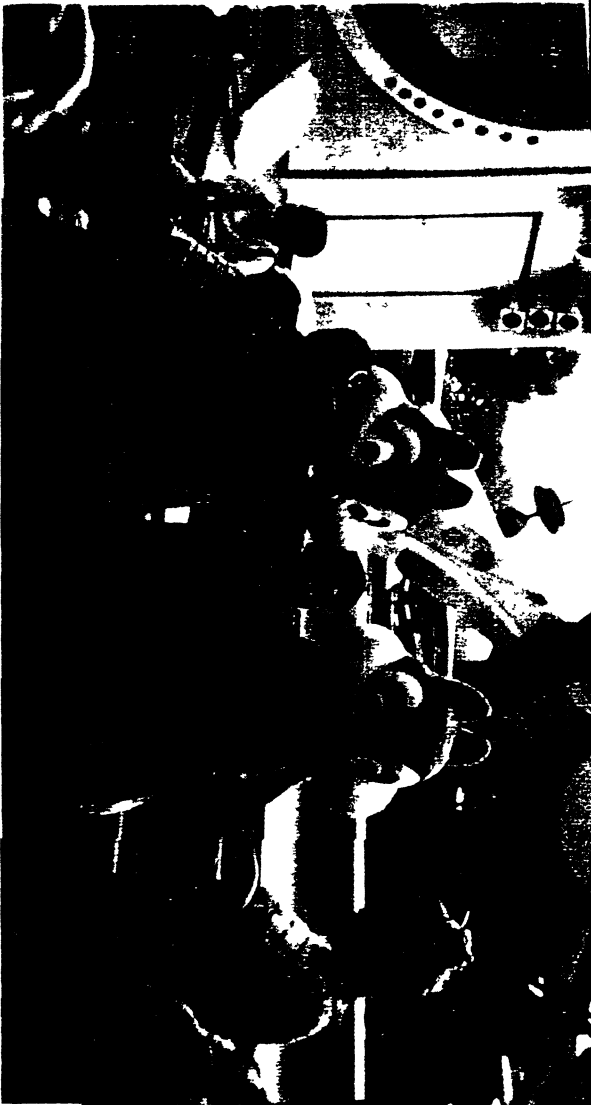












**HI, DAD!**



**EXHIBIT "B"**

more you have the happiest  
Birthday ever.

Love,

Travis

Happy Birthday

Baron

Created  
just for you  
by  
Baron and Trevor

87748



Printed On Recycled Paper  
30% Pre Consumer • 20% Post Consumer

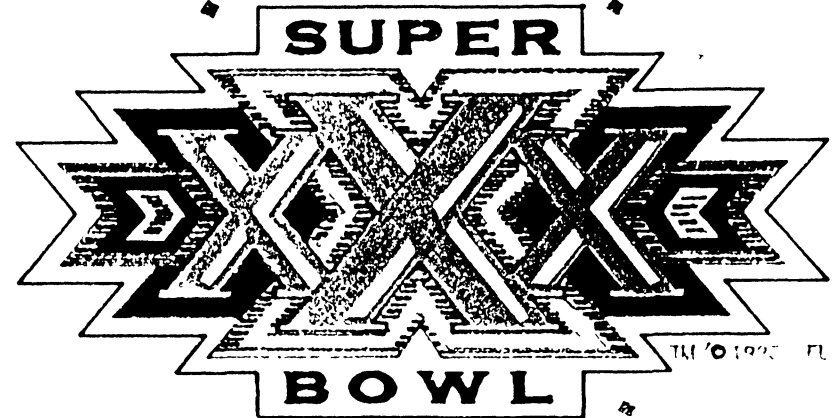


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[www.greeting.com](http://www.greeting.com)

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Cleveland, Ohio 44144



CHAMPIONS

DALLAS  
COWBOYS

EXHIBIT "C"

HEY,  
DADDY,  
LET'S DO IT AGAIN!

come a come, come, come

Yours Truly,  
Baron and Trevor

# SPECIAL SON AWARD

TO

BALCON G. W. GAMBLE

## WHEREAS:

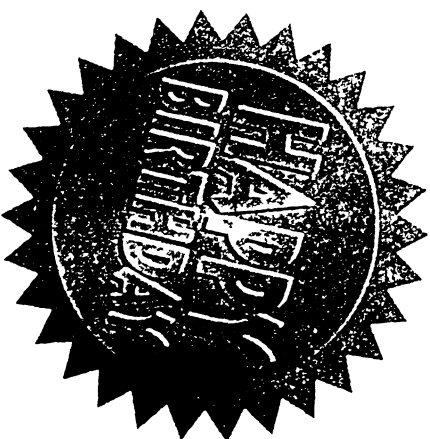
You were a wonderful boy (MOST OF THE TIME),  
You are a fine young man (USUALLY), and  
You have always been a terrific son,

In recognition of your

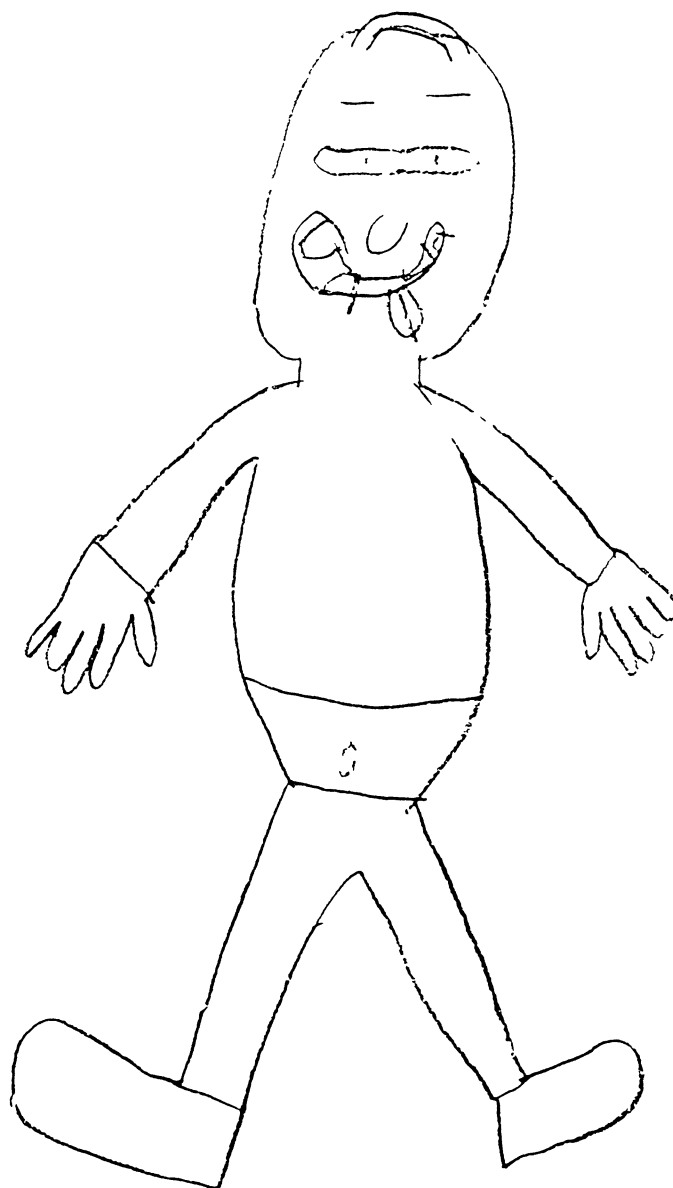
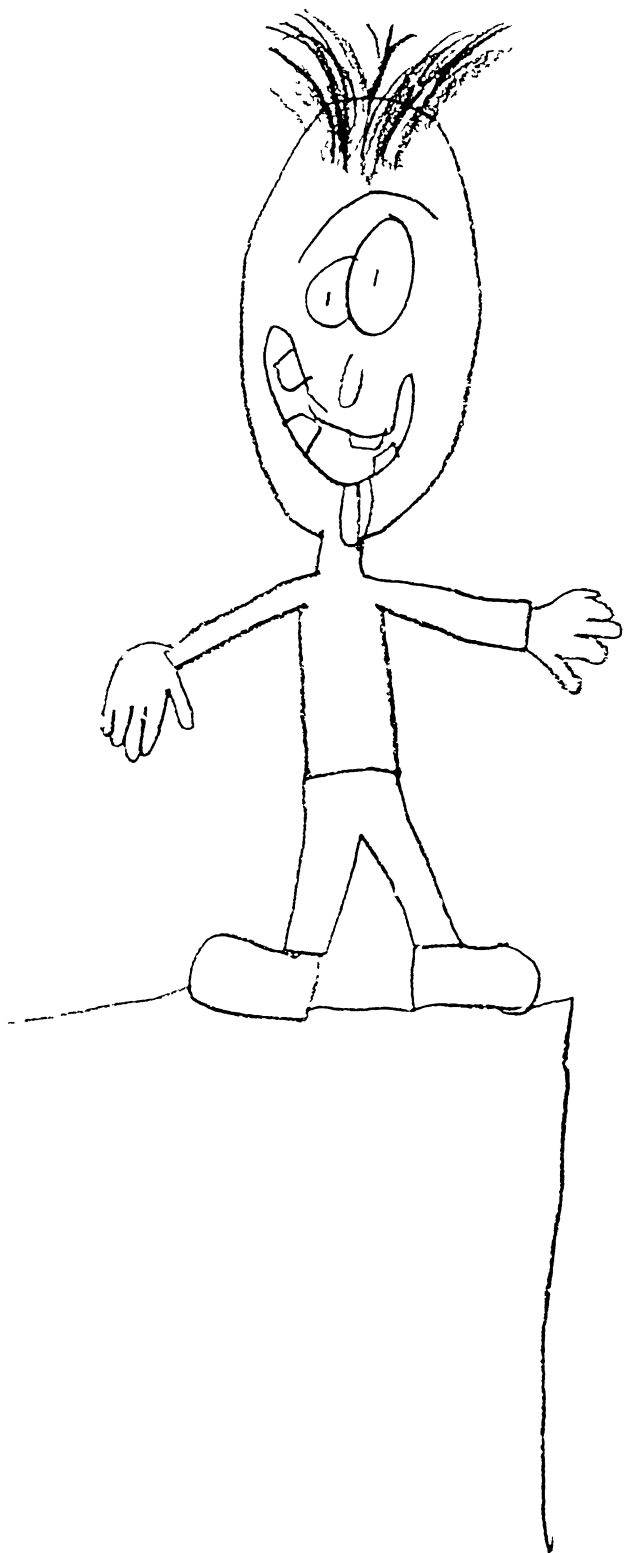
**PLEASEING PERSONALITY, SPARKLING WIT,  
and GOOD LOOKS,**

This award is presented  
with pride and affection by

DADDY Gentry

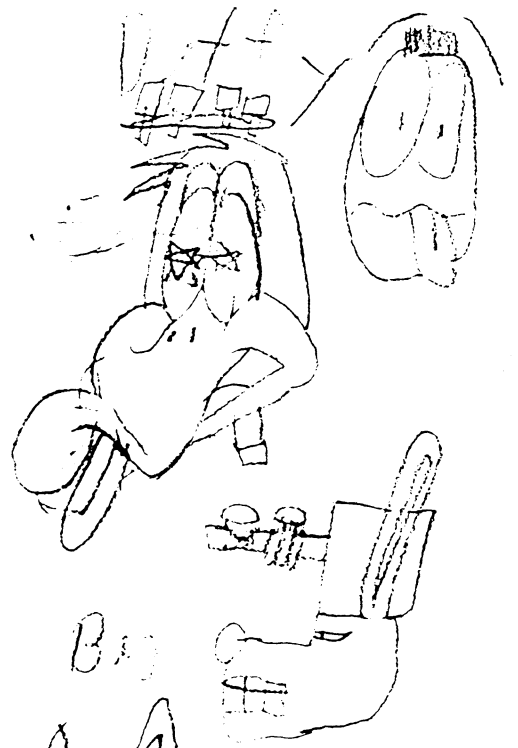
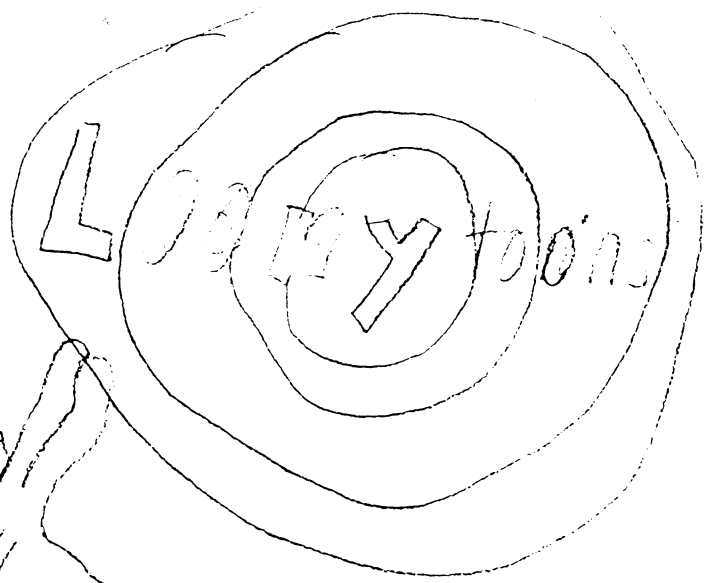


To: Gentry





Marvin



Bug

Taz



To: Gentry  
Love



Basketball, Slam another

Jam in The Basket Baby!

Created  
just for you  
by  
H. And Leo

86154



Printed On Recycled Paper  
30% Post Consumer Waste • 20% Post Consumer

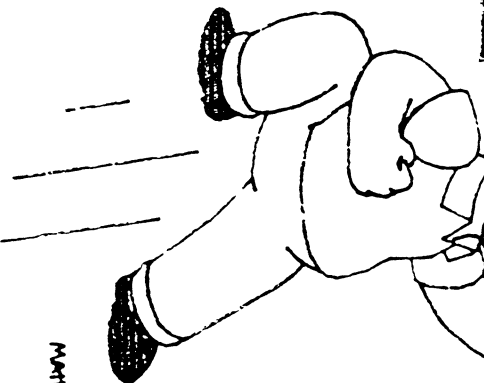
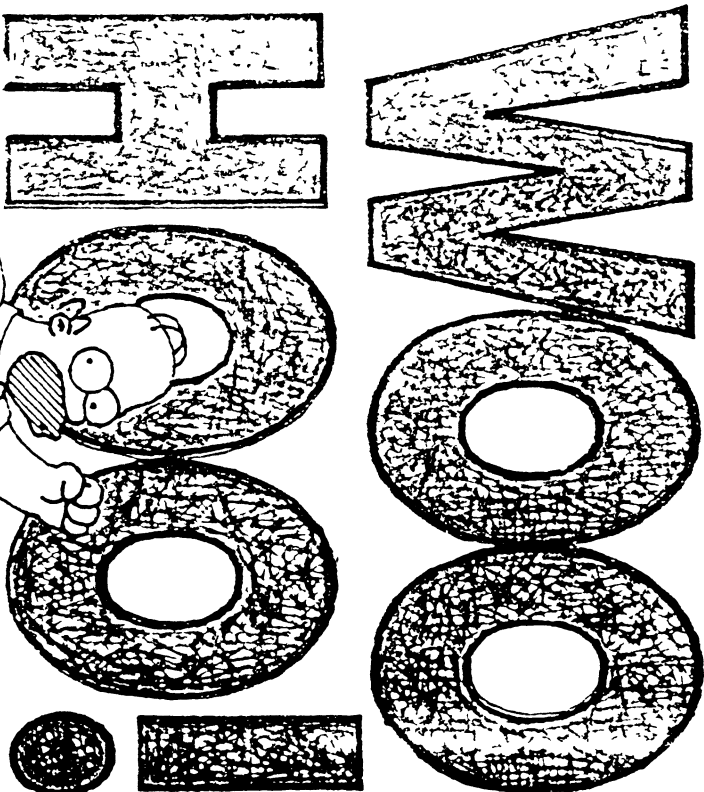


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Century

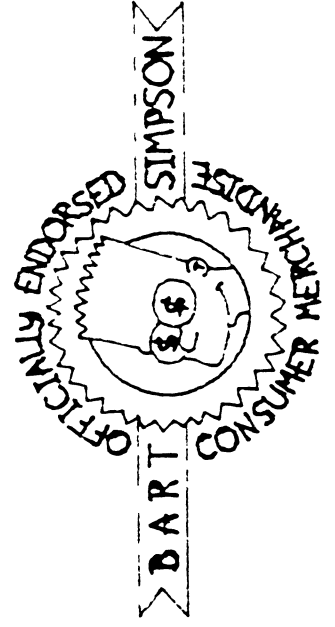


Matt Groening

EXHIBIT "G"

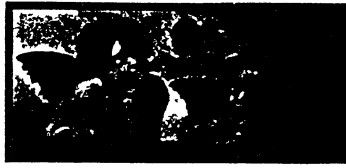
WAY TO GO!

love yaa



Baron Trevor  
B And Tee

12/20/2020  
12/20/2020



Dear Dad  
I love you

because you are my Dad  
I love you because your nice

I love because  
gave me things ~~that~~ that  
are very expensive

I love you for spending  
time with us. I love ~~you~~ you  
because you gave me a bee bee  
gun.

I love you because you took  
me to the state fair. And  
took me to the six flags in Texas.  
you built a tree house. You ~~also make~~  
make us breakfast, lunch, and dinner.  
~~And~~ And you appreciate me.

Love

Brian

To: Gentry



Dear Gentry I love  
you because you  
play ~~with~~ with  
me & take me  
Places here's some-  
thing I made up:  
next time go boom  
by gum dog & go u u u  
u u & I go Ah Ah Ah Ah!  
From: Trev-Trev

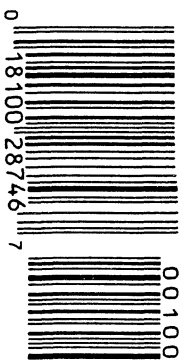


FROM THE TIPS OF MY TOES  
TO THE TIP OF MY NOSE  
TO THE TOP OF MY HEAD  
AND FROM THE BOTTOM  
OF MY HEART,  
I LOVE YOU, DAD!  
HAPPY  
FATHER'S DAY!

look at the left side.  
for you always.

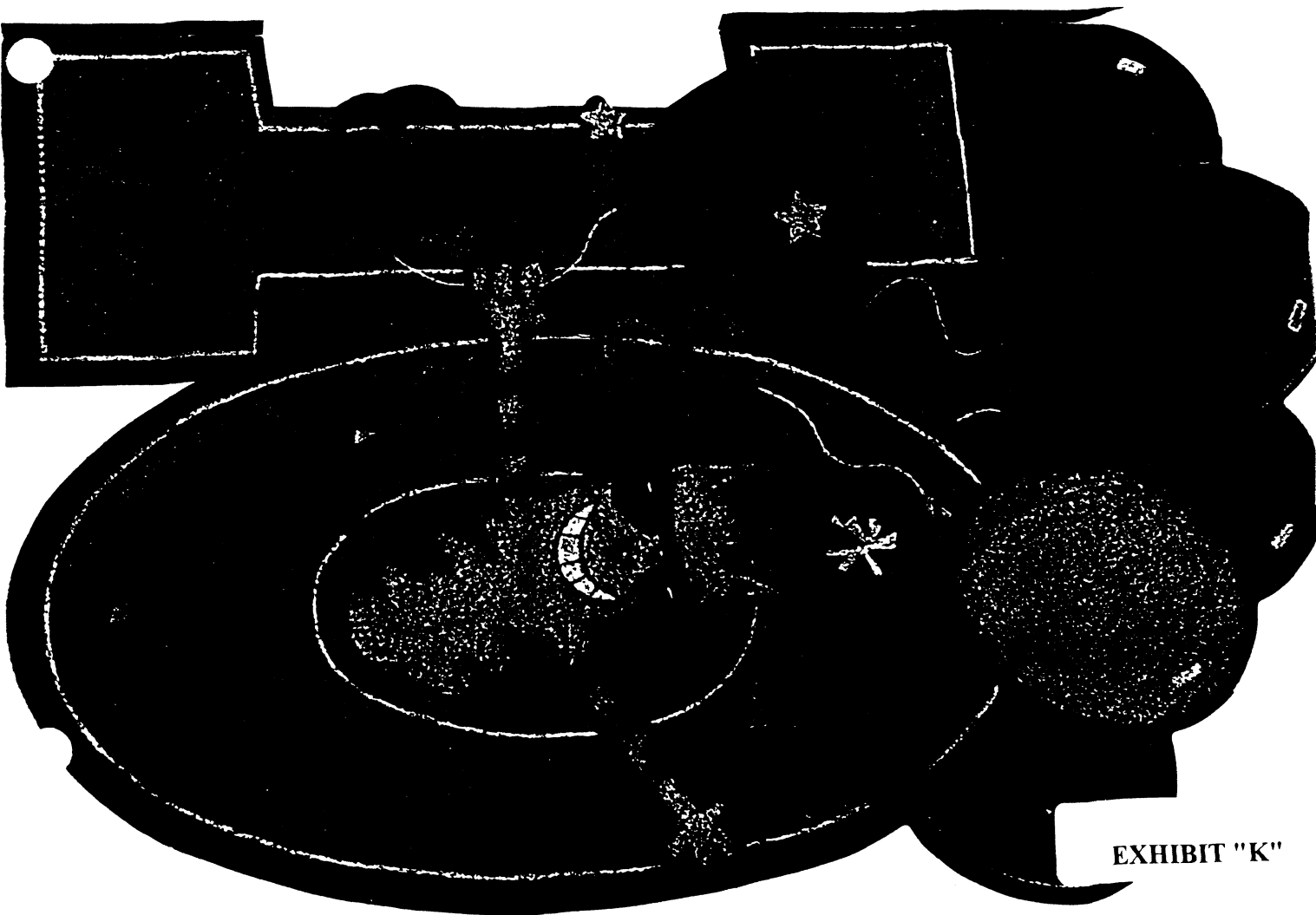
FORGET ME NOT  
AMERICAN GREETINGS

1395099



USA 195 B2306D  
CANADA 225

CARLTON CARDS  
AMERICAN GREETINGS TORONTO ONTARIO M4Z 1S7  
CLEVELAND OH 44114  
© AOC Inc.  
MADE IN U.S.A.



BARON,

I'm very proud of  
you, and very proud to  
be your DADDY and  
your friend. Happy

10<sup>TH</sup> BIRTHDAY BARON.

Double Numbers "Wow"

I LOVE you SOO much

DADDY

~~DEAR BOO~~

10 years OLD

Happy Birthday!

Hope it's a little bit *wild*  
and a whole lot COOL -  
just like you!

Happy BIRTHDAY

DADDY  
GENTRY

he knew nothing

11-11-11

1911

10

# NEW ID!

[illegible]

HAPPY 10<sup>TH</sup>  
BIRTHDAY,  
BARON



MEY

TANNER

BARON

TREVOR

BROWN

KATRINA

AMBUSH

I tried to  
put your present  
in the Living Room but  
it would not fit down the  
chimney! Ho Ho Ho So I put it  
where you would probably will  
have the most fun with it!  
See if you can find your  
present! Merry Christmas  
Love all of you  
\* SANTA \*  
\* \* \*



# WANTED

• FOR •

**STAGE ROBBERY  
HORSE STEALING  
TRAIN ROBBERY  
CARD CHEATING  
HIT BLAIN RAN**

*Jake The  
Snake →  
FOR  
CAPTURE*



*Hole in The Wall guy*

**REWARD  
\$50000**

*Bad Bones  
← Bill*

**MOUSE EAR MIKE  
•  
SHIFTY SHERMAN  
•  
OLD RED EYE  
•  
STINKY BILL  
•  
HARDLUCK HARRY**

*Snake eye  
← Sue*

**IF YOU SEE THIS PERSON IN  
OR NEAR THE WAGONMASTER  
RESTAURANT IN SALT LAKE CITY, UT**

*Pat*

*US*

**NOTIFY MARSHALL**

*March*

**EXHIBIT "P"**



I wonder if this  
new moisturizer will  
make my wrinkles  
disappear?



Happy Birthday  
Julie  
George W. G. and  
Love Julie from Baron Wheeler  
Gamble.

Tab E

GREEN & BERRY  
FREDERICK N. GREEN (1240)  
Attorneys for Petitioner  
622 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111  
Telephone: (801) 363-5650

IN THE THIRD DISTRICT JUVENILE COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

In the interest of

TREVOR B. WHEELER GAMBLE, and  
BARON G. WHEELER GAMBLE.

Persons under the age  
of eighteen (18) years.

**AMENDED PETITION FOR  
TERMINATION  
OF PARENTAL RIGHTS**

**Case No. 933163, 933164**

**Judge Kimberly K. Hornak**

---

Gentry Gamble, Petitioner herein, petitions the Court for termination of parental rights and alleges in support thereof as follows:

1. Gentry Gamble resides at 944 Hyland Lake Drive, Salt Lake County, State of Utah.
2. Trevor B. Wheeler Gamble is a male child, born February 10, 1987; and, Baron G. Wheeler Gamble is a male child, born July 24, 1985.
3. Both children were born in Salt Lake County, State of Utah. Both children reside with Daniel R. Larsen and Catherine J. Wheeler at 3796 East Thousand Oaks Circle, Salt Lake City, Utah.
4. The Petitioner is the natural father of the minor children who has earlier consented to their adoption by Daniel R. Larsen and executed a consent for adoption for that adoption. The consent for adoption was given in partial consideration of the promise of Daniel

R. Larsen and Catherine J. Wheeler for continued and reasonable visitation between the Petitioner and the minor children which has continued up until January, 1997.

5. The Petitioner has maintained with the children and they have reciprocated, the bond and relationship of parent and child.

6. The pertinent information regarding the interested parties is as follows:

<u>Name</u>	<u>Address</u>	<u>Date of Birth</u>
Gentry Gamble	944 Hyland Lake Drive Salt Lake City, UT 84121	09-19-57
Catherine J. Wheeler	3796 E. Thousand Oaks Circle Salt Lake City, UT 84118	10-25-59
Daniel R. Larsen	3796 E. Thousand Oaks Circle Salt Lake City, UT 84118	09-18-58

7. At the present time, Daniel R. Larsen and Catherine J. Wheeler have custody of the minor children.

8. The children have each reported to the Petitioner that they have been physically abused by Wheeler and Larsen. Furthermore, on information and belief the same report has been made by the children to administrators or teachers at their school. Based thereon, and on information and belief, Larsen and Wheeler have neglected or abused the children which behavior renders them unfit or incompetent pursuant to §78-3a-407, Utah Code Ann. (1953 as amended).

9. According to the report of the children, the abuse of the petitioners has taken the following forms:

a. repeated hitting and striking with a man's leather belt;

b. requiring that the children chose the belt. Should the child or children flinch, cry out or resist these beatings, then they are punished with additional "strappings" with the belt;

c. striking and hitting with an open hand and the back of the hand;

d. confinement in closed areas such as the bathroom, a particular spot on a tile floor, or the family dog kennel, without a pillow or blanket, to sleep on a rock/dirt floor.

e. withholding food for up to a day at a time;

f. demeaning and injurious verbal abuse disparaging the children's intellectual capacity and general intelligence;

g. being punched in the stomach and elsewhere on the body;

h. hitting each child with a frying pan, on one occasion with a cooler in the head.

10. On one occasion, Baron has been forced to call 911 to report what he believed to be an emergency related to abuse similar to that set forth above.

11. Typically, the above behavior is inflicted on the children in a response to less than perfect performance of homework or other school assignments, or minor infractions such as leaving a ball-point pen on the floor to be picked up by one of the Respondents.

12. The nature of this abuse consisting of its frequency and lack of reasonable "justification" or explanation by the Respondents, is sufficient to warrant the termination of parental rights.

13. These incidents have been reported to the Division of Family Services or Division of Human Services of the State of Utah,

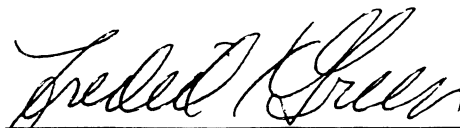
and an investigation has been conducted. Despite the Petitioner's request, that investigation has not been subject to review. On information and belief, Daniel R. Larsen has represented to others, including Baron's school principal or administrator, as well as investigators and police officers, that he is the assistant attorney general in charge of the Division of Family Service, or otherwise occupies some position of authority or power in connection with the Division of Family Services. The Petitioner is reasonably apprehensive that the investigation, if any, has been limited or curtailed because of the representations of Mr. Larsen.

14. It would be reasonable and in the best interests of the children that their custody or guardianship be awarded to the Petitioner.

WHEREFORE, the Petitioner prays that the Court enter an Order terminating the parental rights of Daniel R. Larsen and Catherine J. Wheeler as to the minor children set forth above, and that custody or guardianship of the children be awarded to the Petitioner together with such further and additional relief as the Court may deem proper.

DATED THIS 9 day of July, 1997.

GREEN & BERRY



FREDERICK N. GREEN  
Attorney for Petitioner

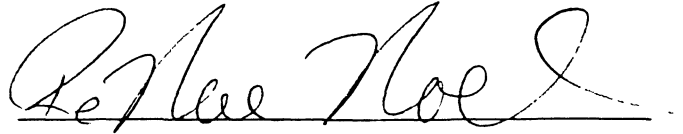
**Petitioner's Address:**  
944 Hyland Lake Drive  
Salt Lake City, Utah 84121

**AFFIDAVIT OF MAILING AND DELIVERY BY FACSIMILE**

I hereby certify that a full, true and correct copy of the above and foregoing **AMENDED PETITION FOR TERMINATION OF PARENTAL RIGHTS** was faxed to the office of William W. Downes, Jr., at 532-3706 and was placed in the United States mail at Salt Lake City, Utah, with first-class postage thereon fully prepaid, on the 9 day of July, 1997, addressed as follows:

*Mailed on 10<sup>th</sup>*

William W. Downes, Jr  
WINDER & HASLEM  
175 West 200 South  
Salt Lake City, UT 84101





Tab F

GREEN & BERRY  
FREDERICK N. GREEN (1240)  
Attorneys for Plaintiff  
622 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111  
Telephone: (801) 363-5650

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

GENTRY GAMBLE,

**NOTICE OF APPEAL**

Plaintiff/Appellant,

vs.

**Civil No. 970901796**

DANIEL R. LARSEN and  
CATHERINE J. WHEELER,

**Judge Pat B. Brian**

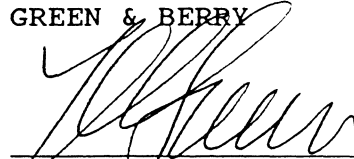
Defendant/Appellee.

---

NOTICE IS HEREBY GIVEN that the Plaintiff and Appellant Gentry Gamble, by and through his attorney of record, Frederick N. Green of Green & Berry, appeals to the Court of Appeals the final Order of the Honorable Pat B. Brian entered in this matter on June 27, 1997, which is an Order Granting Defendant's Motion to Dismiss.

DATED THIS 18 day of July, 1997.

GREEN & BERRY



---

FREDERICK N. GREEN  
Attorney for Plaintiff/Appellant

**CERTIFICATE OF MAILING**

STATE OF UTAH                                 )  
  :SS  
COUNTY OF SALT LAKE                    )

*R. Noel*  
~~Audree D. Askee~~, being duly sworn, says:

That she is employed in the offices of GREEN & BERRY,  
attorneys for Plaintiff herein, that she served pursuant to Rule  
4-504 of the Code of Judicial Administration, the attached NOTICE  
OF APPEAL to the following parties by placing a true and correct  
copy thereof in an envelope addressed to:

William W. Downes, Jr., Esq.  
Winder & Haslam  
Attorneys for Defendants/Appellees  
175 West 200 South, Suite 4000  
Salt Lake City, Utah 84110-2668

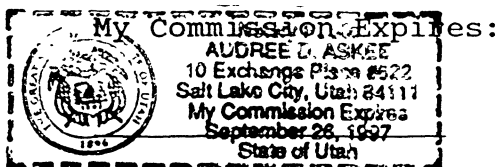
and depositing the same, sealed, with first class postage prepaid  
thereon, in the United States Mail at Salt Lake City, Utah on the  
18 day of ~~June~~ *July*, 1997.

*R. Noel*

SUBSCRIBED AND SWORN to before me this 18 day of June,  
1997.

*Audree Askee*

Notary Public  
Residing in Salt Lake  
County, State of Utah



Tab G

## NOTES TO DECISIONS

## ANALYSIS

After-born child  
 Prima facie case.  
 Protection of children

**After-born child.**

Former § 78-3a-2(16)(a)(iv), granting courts jurisdiction to determine if a child was abused or neglected, could apply to a child conceived and born after another child in the home was abused or neglected. *K.K. v. State*, 286 Utah Adv. Rep. 22 (Utah Ct. App. 1996).

**Prima facie case.**

Evidence was sufficient to establish the elements of a prima facie case of neglect under former § 78-3a-2(16)(a)(iv) where appellant admitted that she caused the skull fractures and

broken bones of subject child's siblings and evidence showed that the father was unable to protect the children and the serious abuse of subject child's siblings occurred only ten months before his birth. *K.K. v. State*, 286 Utah Adv. Rep. 22 (Utah Ct. App. 1996).

**Protection of children.**

Guardian mother had a good faith basis that was objectively reasonable for believing in the need to consent on behalf of her minor children to the taping of telephone conversations with her estranged husband in order to fulfill her statutory mandate under former § 78-3a-2 to act in the best interests of the children. *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993).

## **78-3a-104. Jurisdiction of juvenile court — Original — Exclusive.**

(1) Except as otherwise provided by law, the juvenile court has exclusive original jurisdiction in proceedings concerning:

(a) a minor who has violated any federal, state, or local law or municipal ordinance or a person younger than 21 years of age who has violated any law or ordinance before becoming 18 years of age, regardless of where the violation occurred, excluding traffic laws and ordinances;

(b) a person 21 years of age or older who has failed or refused to comply with an order of the juvenile court to pay a fine or restitution, if the order was imposed prior to the person's 21st birthday; however, the continuing jurisdiction is limited to causing compliance with existing orders;

(c) a minor who is abused, neglected, or dependent, as those terms are defined in Section 78-3a-103;

(d) the determination of the custody of a minor or to appoint a guardian of the person or other guardian of a minor who comes within the court's jurisdiction under other provisions of this section;

(e) the termination of the legal parent-child relationship in accordance with Part 4, Termination of Parental Rights Act, including termination of residual parental rights and duties;

(f) the treatment or commitment of a mentally retarded minor;

(g) a minor who, in defiance of earnest and persistent efforts on the part of his parents and school authorities as required under Section 53A-11-103, is a habitual truant from school;

(h) the judicial consent to the marriage of a minor under age 16 upon a determination of voluntariness or where otherwise required by law, employment, or enlistment of a minor when consent is required by law;

(i) any parent or parents of a minor committed to a secure youth corrections facility, to order, at the discretion of the court and on the recommendation of a secure youth corrections facility, the parent or parents of a minor committed to a secure youth corrections facility for a custodial term, to undergo group rehabilitation therapy under the direction of a secure youth corrections facility therapist, who has supervision of that parent's or parents' minor, or any other therapist the court may

direct, for a period directed by the court as recommended by a secure youth corrections facility;

(j) a minor under Title 55, Chapter 12, Interstate Compact on Juveniles;

(k) the treatment or commitment of a mentally ill child. The court may commit a child to the physical custody of a local mental health authority or to the legal custody of the Division of Mental Health in accordance with the procedures and requirements of Title 62A, Chapter 12, Part 2A. The court may not commit a child directly to the Utah State Hospital; and

(l) the commitment of a minor in accordance with Section 62A-8-501.

(2) In addition to the provisions of Subsection (1)(a) the juvenile court has exclusive jurisdiction over any traffic offense committed by a minor under 16 years of age and concurrent jurisdiction over the following traffic offenses committed by a minor 16 years of age or older:

(a) Section 76-5-207, automobile homicide;

(b) Section 41-6-44, operating a vehicle while under the influence of alcohol or drugs;

(c) Section 41-6-45, reckless driving;

(d) Section 41-1a-1311, unauthorized control over a motor vehicle, trailer, or semitrailer;

(e) Section 41-1a-1314, unauthorized control over a motor vehicle, trailer, or semitrailer for an extended period of time; and

(f) Section 41-6-13.5, fleeing a peace officer.

(3) The court also has jurisdiction over traffic offenses that are part of a single criminal episode filed in a petition that contains an offense over which the court has jurisdiction.

(4) The juvenile court has jurisdiction over questions of custody, support, and visitation certified to it by the district court.

(5) The juvenile court has jurisdiction over an ungovernable or runaway minor who is referred to it by the Division of Child and Family Services or by public or private agencies that contract with the division to provide services to that minor where, despite earnest and persistent efforts by the division or agency, the minor has demonstrated that he:

(a) is beyond the control of his parent, guardian, lawful custodian, or school authorities to the extent that his behavior or condition endangers his own welfare or the welfare of others; or

(b) has run away from home.

(6) This section does not restrict the right of access to the juvenile court by private agencies or other persons.

(7) The juvenile court has jurisdiction of all magistrate functions relative to cases arising under Section 78-3a-602.

**History:** C. 1953, 78-3a-104, enacted by L. 1996, ch. 1, § 27; 1996, ch. 234, § 15; 1996, ch. 318, § 36.

**Amendment Notes.** — The 1996 amendment by ch. 234, effective April 29, 1996, added Subsections (1)(k) and (1)(l), making a related stylistic change, and in Subsection (1)(f) deleted “mentally ill or” before “mentally retarded minor” and “who comes within the court’s jurisdiction under other provisions of this section”

after “mentally retard minor.”

The 1996 amendment by ch. 318, effective April 29, 1996, inserted “Child and” in Subsection (5).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Effective Dates.** — Laws 1996, ch. 1, § 94 makes the act effective on January 31, 1996.

## NOTES TO DECISIONS

**Construction with other law.**

A proceeding involving the termination of a parent's rights and obligations is not a custody proceeding under the Utah Uniform Child Custody Jurisdiction Act (UCCJA), § 78-45c-1 et seq., Utah's Termination of Parental Rights Act, § 78-3a-402 et seq., in conjunction with statutory provisions granting exclusive original

jurisdiction to juvenile courts in termination proceedings, provides a specific statutory framework to follow in termination proceedings, and these specific statutory provisions prevail over the more general provisions of the Utah UCCJA, which makes no specific reference to termination proceedings. *T.B. v. M.M.J.*, 278 Utah Adv. Rep. 16 (Utah Ct. App. 1995).

**78-3a-105. Concurrent jurisdiction.**

(1) The district court or other court exercising jurisdiction over a violation has concurrent jurisdiction with the juvenile court:

(a) when a person 18 years of age or older who is under the continuing jurisdiction of the juvenile court under Section 78-3a-516 violates any federal, state, or local law or municipal ordinance;

(b) in adoption proceedings where the court has previously entered an order terminating the rights of a parent and the court finds that adoption is in the best interests of the minor. Adoption proceedings under this section follow the procedure in Title 78, Chapter 30, Adoption.

(2) The juvenile court has jurisdiction over petitions to modify a minor's birth certificate if the court otherwise has jurisdiction over the minor.

(3) (a) This section does not deprive the district court of jurisdiction to appoint a guardian for a minor, or to determine the support, custody, and visitation of a minor upon writ of habeas corpus or when the question of support, custody, and visitation is incidental to the determination of a cause in the district court.

(b) However, if a petition involving the same minor is pending in the juvenile court or the juvenile court has previously acquired continuing jurisdiction over the same minor, the district court may certify the question of support, custody, and visitation to the juvenile court for determination.

(4) A district court may at any time decline to pass upon a question of support, custody, and visitation and may certify those questions to the juvenile court.

(5) When a question is certified to the juvenile court under Subsection (3) or (4), the findings and order of the juvenile court judge are the order of the district court.

(6) (a) Where a support, custody, or visitation award has been made in a district court in a divorce action or other proceeding and the jurisdiction of the district court in the case is continuing, the juvenile court may acquire jurisdiction in a case involving the same minor if the minor is dependent, abused, or neglected or otherwise comes within the jurisdiction of the juvenile court under Section 78-3a-104.

(b) The juvenile court may by order change the custody, support, and visitation rights previously ordered in the district court as necessary to implement the order of the juvenile court for the safety and welfare of the minor. The juvenile court order remains in effect so long as the jurisdiction of the juvenile court continues.

(7) Upon the filing of a copy of the findings and order of the juvenile court with the district court, the findings and order of the juvenile court are binding on the parties to the divorce action as though entered in the district court.

Tab H



Foster parents' agreement that they will not attempt to adopt foster child, validity and enforcement, 78 A L R 3d 770

Age of prospective adoptive parent as factor in adoption proceedings, 84 A L R 3d 665

Equitable adoption or adoption by estoppel, 94 A L R 3d 347

Marital status of prospective parents as factor, 2 A L R 4th 555

Criminal liability of one arranging for adoption of child through other than licensed child placement agency ("baby broker acts"), 3 A L R 4th 468

Standing of foster parent to seek termination of rights of foster child's natural parents, 21 A L R 4th 535

Race as factor in adoption proceedings, 34 A L R 4th 167

Marital or sexual relationship between parties as affecting right to adopt, 42 A L R 4th 776

Parties required in adoption proceedings, 48 A L R 4th 860

Action for wrongful adoption based on misrepresentation of child's mental or physical condition or parentage, 56 A L R 4th 375

Who is "stepchild" for purposes of § 101(b)(1)(B) of Immigration and Nationality Act (8 U S C S § 1101(b)(1)(B)), 54 A L R Fed 182

When is illegitimate child "legitimated" for purposes of § 101(b)(1)(C) of Immigration and Nationality Act (8 U S C S § 1101(b)(1)(C)), 63 A L R Fed 520

**Key Numbers.** — Adoption ⇌ 4, 5

### 78-30-1.1. Licensed child placing agency — Defined.

As used in this chapter the term "licensed child placing agency" means an agency licensed to place children for adoption under Title 62A, Chapter 4, Part 2

**History:** C. 1953, 78-30-1.1, enacted by L. 1990, ch. 245, § 3.

**Effective Dates.** — Laws 1990, ch 245 be-

came effective on April 23, 1990, pursuant to Utah Const, Art VI, Sec 25

### 78-30-1.5. Legislative intent.

It is the intent and desire of the Legislature that in every adoption the best interest of the child should govern and be of foremost concern in the court's determination

**History:** C. 1953, 78-30-1 5, enacted by L. 1990, ch. 245, § 4.

**Effective Dates.** — Laws 1990, ch 245 be-

came effective on April 23, 1990, pursuant to Utah Const, Art VI, Sec 25

### 78-30-2. Relative ages.

A person adopting a child must be at least ten years older than the child adopted, unless the petitioners for adoption are a married couple, one of which is at least ten years older than the child.

**History:** R.S. 1898 & C.L. 1907, § 2; C.L. 1917, § 11; R.S. 1933 & C. 1943, 14-4-2; L. 1985, ch. 20, § 1.

### COLLATERAL REFERENCES

**Utah Law Review.** — Comment, The Utah Supreme Court and the Utah State Constitution, 1986 Utah L Rev 319

**Am. Jur. 2d.** — 2 Am Jur 2d Adoption § 10

**C.J.S.** — 2 C J S Adoption of Persons § 13

**Key Numbers.** — Adoption ⇌ 4

Tab I

**Amendment Notes.** — The 1996 amendment deleted provisions relating to circuit courts from the applicability paragraph and the statement of the rule and substituted “prosecuting attorney” for “county attorney” in Subdivisions (1)(A), (2)(A), and (2)(C)

### **Rule 4-902. Certification of district court cases to juvenile court.**

#### **Intent:**

To establish a procedure for the district court to certify questions of support, custody or visitation to the juvenile court.

#### **Applicability:**

This rule shall apply to the district and juvenile courts.

#### **Statement of the Rule:**

(1) In district court cases where there is a question concerning the support, custody or visitation of a child and a petition concerning abuse, dependency, or neglect of the same child has been filed in juvenile court, the district court shall certify the question of support, custody or visitation to the juvenile court for determination.

(2) In other district court cases involving questions of support, custody or visitation, the district court, for good cause shown, upon its own motion or the motion of either party may certify the question of support, custody or visitation to the juvenile court for determination.

(3) A district court order certifying questions of support, custody or visitation of a child shall state whether the question is certified pursuant to Utah Code Ann. Section 78-3a-105(3) or 78-3a-105(4). When a case is certified pursuant to Section 78-3a-105(4), the certification order shall state the reason or reasons for certification and the question or questions to be determined by the juvenile court.

(4) When the district court certifies questions of support, custody or visitation, the clerk of the district court shall transmit the entire case file to the clerk of the juvenile court who shall refer it to the presiding judge for assignment.

(5) When the question or questions certified to the juvenile court have been determined by the juvenile court and the appropriate order entered, the clerk of the juvenile court shall transmit the file to the clerk of the district court, who shall refer it back to the judge assigned to handle the matter.

(Amended effective November 1, 1996.)

**Amendment Notes.** — The 1996 amendment corrected statutory references in Subdivision (3)

### **Rule 4-903. Uniform custody evaluations.**

#### **Intent:**

To establish uniform guidelines for the preparation of custody evaluations.

#### **Applicability:**

This rule shall apply to the district and juvenile courts.

#### **Statement of the Rule:**

(1) Custody evaluations shall be performed by persons with the following minimum qualifications:

(A) Social work evaluations shall be performed by social workers licensed by the state in which they practice.

Tab J

**Rule 60. Relief from judgment or order.**

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

**Compiler's Notes.** — This rule is similar to Rule 60, F.R.C.P.

**NOTES TO DECISIONS****ANALYSIS**

"Any other reason justifying relief."

- Default judgment
- Impossibility of compliance with order.
- Incompetent counsel
- Lack of due process
- Merits of case
- Mistake or inadvertence
- Mutual mistake
- Real party in interest.
- Refund of fine after dismissal

**Appeals.****Clerical mistakes.**

- Computation of damages
- Correction after appeal.
- Date of judgment.
- Void judgment
- Estate record.
- Inherent power of courts.
- Intent of court and parties.
- Judicial error distinguished.
- Order prepared by counsel.
- Predating of new trial motion.
- Court's discretion.
- Default judgment.
- Effect of set-aside judgment.
- Admissions.

**Form of motion.****Fraud.**

- Burden of proof
- Divorce action
- Independent action
- Constitutionality of taxes.
- Divorce decree.
- Fraud or duress.
- Motion distinguished

**Invalid summons.**

- Amendment without notice.
- Inequity of prospective application.
- Jurisdiction.

**Mistake, inadvertence, surprise or excusable neglect.**

- Default judgment.
- Illness.
- Inconvenience.
- Meritorious.
- Merits of claim.
- Negligence of attorney.
- No claim for relief.
- Delayed motion for new trial.
- Factual error.
- Failure to file cost bill.
- Failure to file notice of appeal.
- Nonreceipt of notice and findings.